RECORD, CASE No. [illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

TERM No., 116.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND HENRY HURT, PLAINTIFFS IN ERROR,

vs.

LEON TOBRINER, ADMINISTRATOR OF JOHN HARMON, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 1, 1899.

RECORD, CASE No. 13,677.

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vs.

LEON TOBRINER, ADMINISTRATOR OF JOHN H. HARMON, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 *Declaration & Notice to Plead. Filed Oct.* 31, 1882.

In the Supreme Court of the District of Columbia, the 31 Day of October, A. D. 1882.

JOHN H. HARMON, Plaintiff,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 24010.

The plaintiff sues the defendant, a body corporate under and by virtue of the provisions of the act of Congress of the United States of America approved the 17th day of May, in the year one thousand eight hundred and sixty-two, and entitled "An act to incorporate the Washington and Georgetown Railroad Company," for that whereas on or about the thirtieth day of April, in the year one thousand eight hundred and eighty-two, the defendant, a common carrier of passengers for hire, for and in consideration of a certain fare in that behalf paid to it by plaintiff, undertook to carry and safely deliver plaintiff to and at a point at or near the intersection of Pennsylvania avenue and Nineteenth street northwest, in the
2 city of Washington, in the District of Columbia; but defendant failed to deliver plaintiff safely from said car at or near said point of intersection, and plaintiff, without carelessness or negligence on his part, was at the time and place for delivery aforesaid by and through the carelessness and negligence of the defendant thrown violently to the ground and was then, there, and thereby made to receive a violent concussion of his left hip and leg and to suffer a breakage of some of the blood vessels — his left leg and a severe shock of his body and intestines and great pain and anguish, and plaintiff was, from the effect of said concussion, breakage, and shock, for a period of time made incapable of keeping himself; his left leg was paralyzed, and a rupture, from which he had theretofore been suffering, was made larger and more painful and distressing, and plaintiff ever since has suffered and still is suffering great bodily pain and anguish aforesaid and a permanent, incurable injury to his left hip and leg in consequence of said concussion, the
3 said hip having drawn up and said leg become shorter than it was before said concussion was received, and plaintiff, in consequence of said injuries so suffered by him, was for a period of two weeks confined to his bed in a perfectly helpless condition and was compelled to and did employ a physician at great expense to assist in healing of said injuries, and as a result of said injuries by him so suffered plaintiff is permanently disabled from the performance of his ordinary duties.

And for that whereas plaintiff, on or about the thirtieth day of April, in the year one thousand eight hundred and eighty-two, was a passenger on a car of defendant, a common carrier of passengers for hire, and without carelessness or negligence on his part, but by and through the carelessness and negligence of defendant, was thrown

violently from said car to the ground and greatly hurt and injured.

4 And the plaintiff claims fifteen thousand dollars besides costs.

WILLIAM A. COOK,
LUTHER H. PIKE,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

LUTHER H. PIKE,
——— ———,
Attorneys for Plaintiff.

Summons. Issued Oct. 31, 1882.

In the Supreme Court of the District of Columbia, the 31 Day of October, 1882.

JOHN H. HARMON, Plaintiff,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 24010.

The President of the United States to the defendant, Greeting:

5 You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS,
By J. R. YOUNG, *Ass't Clerk.*

[SEAL.]
L. H. PIKE, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant by service on Henry Hurt, president, the 2 day of Nov'r, 1882.

C. E. HENRY, *Marshal.*

6 *Plea. Filed Nov.* 7, 1882.

In the Supreme Court of the District of Columbia.

JOHN H. HARMON
vs.
THE WASH. & G. R. R. Co. } At Law. No. 24010.

For plea to the plaintiff's declaration the defendant says that it is not guilty as alleged.

ENOCH TOTTEN,
Att'y for the Defendant.

Joinder of Issue, Notice of Trial, and Note of Issue. Filed Nov. 17, 1882.

In the Supreme Court of the District of Columbia.

JOHN H. HARMON
vs.
THE W. & G. T. R. R. Co. } At Law. No. 24010.

The plaintiff joins issue on the defendant's plea.

LUTHER H. PIKE,
COOK & COLE,
Att'ys for Pl'ff.

Enoch Totten, Esq., att'y for def't.

7 Take notice that the issue above joined will be tried at the next term of the court.

L. H. PIKE,
COOK & COLE,
Att'ys for Pl'ff.

Note of Issue.

Att'ys for pl'ff, L. H. Pike, Cook & Cole.
" " def't, Enoch Totten.
Date of last pleading, Nov. 17, '82.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the 18th day, of October, A. D. 1886.

MONDAY, *Oct. 18th, A. D.* 1886.

By order of the Honorable Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened
8 by proclamation of the marshal pursuant to rule of court.

* * * * * * *

THURSDAY, *November 4th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASHINGTON & GEORGETOWN RAILROAD COMPANY, Def't.
} At Law. No. 24010, Cal. 24.

Now comes here as well the plaintiff, by his attorneys, Messrs. Pike, Cook & Cole, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit, Joseph C. Lee, William R. Curtin, George W. Talbert, James H. Bryum, George W. Wise, John H. Beale, Owen O'Hare, Daniel T. Donohue,
9 Wm. H. Bowman, Levi Curry, Charles H. Heitmuller, and John Langford, who, being duly sworn to try the issues above joined, are respited until the meeting of the court to-morrow morning.

FRIDAY, *November 5th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASHINGTON & GEORGETOWN RAILROAD COMPANY, Def't.
} At Law. No. 24010, Cal. 24.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court on Monday morning next.

10 MONDAY, *November 8th, A. D.* 1886.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASHINGTON & GEORGETOWN RAILROAD COMPANY, Def't.
} At Law. No. 24010. Cal. 24.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited on Friday last; whereupon, the testimony being closed, the defendant, by its attorney, moves the court to instruct the jury to return a verdict for the defendant, and, the same having been heard, it is considered that said motion be, and the same is hereby, overruled; whereupon, after the case

is given in charge to the jury, they on their oath say they
11 find said issue in favor of the defendant and assess his damages by reason of the premises at the sum of three thousand dollars besides costs. Therefore it is considered that the plaintiff recover against said defendant three thousand dollars in manner and form aforesaid assessed and $— for his costs of suit, and have execution thereof.

Order for Entry of ⅔ of Judgment to Use of Luther H. Pike. Filed Nov. 9, 1886.

In the Supreme Court of the District of Columbia, the — Day of November, 1886.

JOHN H. HARMON
vs.
WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

The clerk of said court will enter two-thirds of the judgment in above-entitled cause to the use of Luther H. Pike.

JOHN H. HARMON, *Plaintiff.*

12 *Order for Entry of ⅓ of Judgment to Use of John H. Harmon, Jr. Filed Nov. 9th,* 1886.

In the Supreme Court of the District of Columbia, the 9th Day of November, 1886.

JOHN H. HARMON
vs.
WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

The clerk of said court will enter one-third of the judgment in above-entitled cause to the use of John H. Harmon, Junior.

JOHN H. HARMON, *Plaintiff.*

Motion for a New Trial on Exceptions. Filed Nov. 12, 1886.

JNO. H. HARMON
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } Law. No. 24010.

13 And now comes the defendant and moves the court for a new trial on exceptions.

ENOCH TOTTEN,
Att'y for Defendant.

Undertaking for Appeal to General Term. Filed Nov. 12, 1886.

In the Supreme Court of the District of Columbia, the — Day of ——, 188–.

JOHN H. HARMON, Plaintiff,
vs.
THE WASH. & GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 24010.

The defendant, having appealed to the general term from the judgment pronounced herein on or about the 8th of November, 1886, in the circuit court, and Henry Hurt, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by,
14 perform, and pay its judgment, which they agree may be pronounced against all of them.

WASHINGTON & GEO. T. R. R. CO.,
Per H. HURT, *Pres't, Appellant.*
H. HURT, *Surety.*

This undertaking satisfactory.

WILLIAM A. COOK,
Att'y for Pl'ff.

Approved:
A. B. HAGNER.

Nov. 11, '86.

Court Proceedings.

SATURDAY, *January* 22, *A. D.* 1887.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASH. & GEO'TOWN R. R. Co., Def't. } At Law. No. 24010.

15 Now again comes here the defendant, by its said attorney, and tend-s to the court here its bill of exceptions to the ruling of the court on the trial of this cause, and prays that they may be duly signed, sealed, and made a part of the record now for then; which is done accordingly.

Order for Appearance. ***Filed May*** 7, 1887.

In the Supreme Court of the District of Columbia, the 7th day of May, 1887.

JOHN H. HARMON
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

The clerk of said court will please enter upon the docket in this cause our appearance for the plaintiff.

WILLIAM A. COOK,
C. C. COLE,
Attorneys for Plaintiff.

16 *Proceedings in General Term.*

MONDAY, *April* 25, 1887.

Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing on the fourth Monday, 25th day, of April, 1887.

Present, presiding: Justices Hagner, James, Cox, and Merrick.

* * * * * * *

MONDAY, *June* 27, 1887.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justices James and Merrick.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
THE WASH. & GEORGETOWN RAILROAD COMPANY, Def't. } At Law.. No. 24010.

17 Argued by Messrs. Totten & Davidge, for defendant, appellant, and Messrs. Cook and Cole, for plaintiff, appellee, and submitted to the court.

MONDAY, *July* 11, 1887.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Associate Justices James, Montgomery, and Merrick.

Memorandum.

Judgment of special term reversed and cause remanded for new trial.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the seventeenth day, of October, A. D. 1887.

18 MONDAY, *October 17th, A. D.* 1887.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

WEDNESDAY, *November 30th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASHINGTON AND GEORGETOWN R. R. Co., Def't. } At Law. 24010, Cal. 5.

Now again comes here as well the plaintiff, by his attorneys, Messrs. Pike, Cook & Cole, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit,
19 Martin Hebner, William Carley, Samuel Owens, Joseph T. Kengla, James R. D. Morrison, Cortland Boyer, William H. Combs, Henry K. Fulton, Oscar N. Brown, Jacob Farrell, Ernest Burgdorf, and James McLaughlin, who, being duly sworn to try the issue above joined, are respited until the meeting of the court tomorrow morning.

THURSDAY, *December 1st, A. D.* 1889.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JOHN HARMON, Pl'ff,
vs.
WASHINGTON & GEORGETOWN R. R. Co., Def't. } At Law. No. 24010, Cal. 5.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the
20 case is given them in charge, on their oath say they find said issue in favor of the plaintiff, and assess his damages by reason of the premises at the sum of six thousand and five hundred dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant six thousand and five hundred dollars for his damages, in manner and form as aforesaid assessed, and $— for his costs of suit, and have execution thereof.

Order for Entry ⅓ Judgment to Use of John H. Harmon, Jr. Filed Dec. 3, 1887.

In the Supreme Court of the District of Columbia, the — Day of December, 1887.

JOHN H. HARMON
vs.
THE W. & G. T. R. R. Co. } At Law. No. 24010.

21 The clerk of said court will please enter one-third of the judgment recorded herein on December 1, 1887, to the use of John H. Harmon, Jr.

JOHN H. HARMON.

LUTHER H. PIKE,
Attorney for Plaintiff.

Motion for a New Trial on Exceptions. Filed Dec. 3, 1887.

In the Supreme Court of the District of Columbia.

JOHN H. HARMON
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

Motion for new trial.

And now comes the said defendant and moves the court to set aside the verdict and for a new trial on exceptions.

And said defendant moves the court to set aside said verdict and for a new trial for errors of law founded on the exceptions reserved during the trial.

22 And said defendant also moves the court to set aside the verdict and grant a new trial, because the evidence was insufficient in law and because the damages awarded by the jury are excessive.

ENOCH TOTTEN,
For Defendant.

Court Proceedings.

TUESDAY, *December 6th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, Def't. } At Law. No. 24010.

On motion of the defendant, by its said attorney, the court
23 orders that the time for filing the undertaking to stay proceedings on judgment in this case be enlarged, so as to extend to the time when the motion for a new trial herein shall have been decided by the circuit court and ten days beyond.

SATURDAY, *December 17th, A. D.* 1887.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
WASHINGTON & GEORGETOWN R. R. Co., Def't. } At Law. No. 24010.

Upon hearing the defendant's motion for a new trial it is considered that said motion be, and the same is hereby, overruled. Appeal by defendant.

24 *Appeal. Filed Dec.* 22, 1887.

In the Supreme Court of the District of Columbia.

JOHN H. HARMON
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

Appeal.

And now comes the said defendant and appeals to the general term from the judgment of the circuit court in the above-entitled cause denying the said defendant's motion to set aside the verdict and judgment and for a new trial.

ENOCH TOTTEN,
Att'y for Def't.

Undertaking for Appeal by W. & G. R. R. Co. to General Term. Filed Dec. 22, 1887.

In the Supreme Court of the District of Columbia, the 22 Day of December, 1887.

25 JOHN H. HARMON, Plaintiff,
vs.
THE WASH'N & GEORGETOWN R. R. Co., Defendant. } No. 24010.

The defendant having appealed to the general term from the judgment pronounced herein on the 1st and 17th of December, 1887, in the circuit court, and Henry Hurt, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

WASHINGTON & GEO'TOWN R. R. CO., *Appellant*,
Per H. HURT, *P't*,
H. HURT, *Surety*.

Approved:
W. S. COX, *J.*

This satisfactory.

WILLIAM A. COOK, *For Pl't'ff*.

26 *Court Proceedings.*

SATURDAY, *January 21st, A. D.* 1888.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

JOHN H. HARMON, Pl'ff,
vs.
THE WASHINGTON & GEORGETOWN R. R. Co., Def't. } At Law. No. 24010.

Now comes here the defendant, by its attorney, Mr. Totten, and tenders to the court here its bills of exceptions and case to the rulings of the court on the trial of this case and prays that they be duly signed, sealed, and made a part of the record now for them which is done accordingly.

27 Supreme Court, District of Columbia.

(Filed January 21st, 1888.—R. J. Meigs, clerk.)

JOHN H. HARMON
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

Exceptions.

Be it remembered that on the 30th day of November, A. D. 1887, the above-entitled cause came on for trial, and, a jury having been empanneled and sworn, the plaintiff, to maintain the issue on his part joined, was sworn as a witness and testified that on the evening of the 28th or 20th of April, 1882, at about nine o'clock, he took passage on one of defendant's cars on Pennsylvania avenue, in the city of Washington, to go to his home on 19th street west, between L and M streets north; that he took his seat on the south side of the car, about two-thirds of the distance from the rear platform, and paid his fare; that along or about 19th street west he signalled to the conductor to let him off; that the conductor was then inside the car figuring up his accounts under the light; that upon receiving the signal the conductor rang the bell and the car began to slow and, as he supposed, then about stopping; that the plaintiff got through the crown in the rear of the car; that there were not so many passengers inside, but that the plat-
28 form of the car was crowded; that he made his way through the crowd on the platform down to the step, which was occupied by a man and a boy at each end, having hold of the railings; that the car at that time was almost at a standstill; that the plaintiff could not swing off and could not get back, and that just then the bell was rung and the car started and threw him off on the pavement, whereby he was injured; that his hip was thrown out of joint and the socket of the hip-joint on the left side was injured so that the upper end of the side bone sank deeper into the cavity, so as to create a shortening of the limb and a permanent injury; that his knee was also bruised and abraided, and in consequence of his said injuries he suffered great pain and was confined to his bed in a helpless condition for two months before he could turn over or get up, and was compelled to go on crutches for about four or five months; that any exposure or barometrical changes would effect the limb and give him trouble; that the left leg is about three quarters of an inch shorter than the other and is a good deal smaller, and that it gets tired very quick in walking; that he was under care of a physician for several weeks, and the expense for professional services was about $150.

The plaintiff, to further maintain the issues on his part, testified that the conductor did nothing to assist him in getting off the car. He did not give him time to get off; did not go out to the platform to assist him; that he had just got onto the step when the bell rang to start the car; that he had been a passenger on the car of the de-

fendant company any number of times, riding twice a day over the said line of railroad for five years.

On cross-examination the plaintiff testified that he was born in the month of June, 1818, and that at the time when this accident happened he was representing the Michigan interest in favor of bridging the Detroit river for railroad purposes before the Congress of the United States; that he went to the Capitol almost every day and always rode upon the cars
29 of the defendant company; that he rode upon the said cars from 19th street to the Capitol in the morning and generally returned home in the evening at about 8 o'clock, but that on the evening of the accident it was about nine o'clock; that his physical health on that occasion was good, and that he was a "pretty well preserved man;" that when the plaintiff got on the car opposite the National hotel there were at least three persons on the rear platform and about eight persons inside the car; that after leaving 7th street junction there were six or seven on the platform and not over eight in the car; that at the New York avenue junction some got on and some got off, and that after leaving the said junction there were six or eight passengers on the inside of the car and the platform was full; that he had difficulty in crowding through the passengers on the platform, and it was so full that this man and boy stood upon the step; that after the car left 15th street there were seven or eight passengers upon the platform, and that he noticed that it was crowded; that when he came out of the car he saw the man and boy on the step; that he signalled to the conductor to stop the car before it reached 19th street, and the conductors all knew where the plaintiff was in the habit of getting off the car; that the conductor did not slow up sufficiently and he did not get through the crowd until the car got a little past the corner of 19th street, on the west side; that the conductor, upon receiving the signal to stop the car, promptly rang the bell to stop; that he saw the conductor ring the bell, heard the bell ring, and felt the motion of the car diminish; that at about the same time the conductor rang the bell he got up and went to the rear door of the car, which was opened for him by the conductor; that the conductor was standing at the door, under the light on the north side of the door, looking up his accounts; that the conductor or some one else opened the door for him; that there were seven or eight or nine men on the platform (including a boy on the step next to the car, holding on to the rail of the
30 car, and a man at the other end of the step, holding on to the rail of the dash-board of the car).

The plaintiff, on cross-examination and in answer to interrogatories propounded to him by counsel for the defendant, further testified as follows:

"Q. You say you had difficulty in getting through that crowd?

A. Yes, sir.

Q. How long did it take you to get through the crowd?

A. It took long enough for a car to get across 19th street, at least, before I got through it.

Q. Had it then begun to increase its speed or was it still slowing down?

A. It was still slowing down. They had been in the habit of coming very near to a stand for me.

Q. This conductor?

A. No; not that one.

Q. Don't they always stop for you?

A. When you signal them, if you would not move they would come to a standstill; but if you get up they don't come to a standstill.

Q. Did he on that occasion?

A. He intended to slow up. He rung the bell, but did not look to see how it was going. He left it to the driver.

Q. How do you know that?

A. He was footing up his accounts as I passed him at the door.

Q. You concluded from that fact that he did not see you?

A. Yes, sir.

Q. How many seconds or minutes transpired from the ringing of the bell until the time you got out?

A. Five seconds, probably.

Q. Not longer than that?

A. No, sir.

Q. Nineteenth street is 80 feet wide?

A. Yes, sir.

Q. You went clear across that street in five seconds?

A. He did not get clear across it; he did not ring the bell until we had crossed the line; he knew which side I got off on.

Q. How do you know he knew?

A. He had stopped times enough.

Q. That man?

A. Yes, sir.

Q. You knew him, did you?

A. Yes, sir.

31 Q. How far beyond the west line of 19th street did he get before you got off?

A. He got to about a line with the buildings.

Q. Then he got beyond the curb-line?

A. Yes, sir; he got beyond the curb-line before it got slow enough.

Q. In which hand did you have your cane when you got off?

A. In my right hand, always.

Q. You crowded down through this crowd, between a man and a boy, to the lower step?

A. Yes, sir.

Q. Did it not occur to you that that was a dangerous experiment?

A. To go down there?

Q. Yes, sir.

A. Not at all; I supposed the car would stop; I supposed I could swing off until I got to the step.

Q. Could you swing off when the boy was standing there?

A. I could not then.

Q. You saw that was dangerous, didn't you?
A. The car was almost at a stand.
Q. In the first place you encountered a crowd on the platform, and in the next place a man and a boy having hold of the hand-rails?
A. Yes, sir.
Q. You saw that you could not get hold of anything?
A. Yes, sir.
Q. How could you swing off?
A. I didn't swing off.
Q. You said you thought you would?
A. I said I thought I could; but when I got there, no sooner had I put my foot to the step when the bell rung and the car gave a jerk.
Q. Did you have both feet on the step when the bell rung?
A. I think I did.
Q. You did not have hold of anything?
A. No, sir.
Q. The car was still in motion?
A. The car was almost at a standstill when he rung the bell and the car started.
Q. Still it was moving?
A. Slightly moving.
Q. The bell was jerked and the car was started?
A. Yes, sir.
32 Q. Did you fall forward or backwards?
A. It threw me clear around and I fell on my left side.
Q. Which way did you turn—from left to right?
A. I stepped down and I almost always used the right foot to step off with.
Q. You stepped off with the right foot?
A. I did not step off at all; I fell off or was thrown off.
Q. You fell off on the right foot?
A. It turned me around so that I fell on my left side.
Q. Did you fall from the car or towards the horses?
A. I fell from the car towards the rear. It turned me clear around.
Q. Your hip was further from the horses than your foot when you struck the ground?
A. Yes, sir.
Q. The street is paved with stone there, is it?
A. No, sir.
Q. What with?
A. Asphalt.
Q. Was the asphalt wet or dry?
A. It was dry.
Q. You said you believed you paid Dr. Bliss one hundred and fifty dollars?
A. Yes, sir.
Q. Don't you know whether you paid him one hundred and fifty dollars?

A. I know I did; but there might have been a call before that I might have included in it.

Q. Was it customary for you to get off the car at that place before it stopped?

A. No, sir.

Q. It was usual for it to stop?

A. Yes, sir.

Q. Stone still?

A. I don't get off or on until it stops.

Q. Did you then?

A. No, sir; I never jump off.

Q. You are very careful about that?

A. I never jump off. I could not afford to jump off a car at my age.

Q. Didn't you say a little while ago that the conductors were only in the habit of slowing up for you?

A. Yes, sir; very slow too.

Q. Do you mean that you get off without the car having totally stopped?

A. I very often walk from the National hotel to 7th street, so they would be at a dead standstill to get into them since this happened.

33 Mr. DAVIDGE: We want to know about before this happened.

The WITNESS: I never jump on a car when it is in motion.

By Mr. TOTTEN:

Q. Did you ever jump off a car when it is in motion before the accident?

A. No, sir.

Q. You are not in the habit of doing that?

A. No, sir.

Q. Then when you said that the conductor was in the habit of slowing up for you you meant that they were in the habit of stopping?

A. They would very nearly stop.

Q. Then you would get off before they would entirely stop?

A. Always.

Q. Always—what?

A. They always slowed up to a dead standstill.

By Mr. DAVIDGE:

Q. Would you get off before the car stopped or would you wait until the car stopped?

A. I always waited until the car stopped.

Q. That was your regular habit?

A. Yes, sir.

By Mr. TOTTEN:

Q. Then when you said that the conductor slowed up for you you meant that they stopped?

A. Yes, sir.

Q. Did you ever get off at 19th street when the car was still in motion?

A. Only when the car was just barely moving I have, but never when they were under way.

Q. You mean going at a trot?

A. No, sir.

Q. You never got off when the horses were galloping with the car?

A. I never saw them gallop on that road."

34 The plaintiff, to further maintain the issue on his part joined, testified on his redirect examination, and in answer to interrogatories propounded to him by counsel for the plaintiff, as follows:

By Mr. PIKE:

Q. When did you first see the boy and man on the step?

A. I saw them when I got through the crowd. I saw the boy there.

Q. When you stepped on that step was it to wait for the car to stop, or was it to get off?

A. The car was almost stopped.

Q. You simply got there to step off when the car stopped?

A. Yes, sir.

By Mr. DAVIDGE:

Q. There was nobody else thrown off on that occasion but yourself?

A. No, sir.

The plaintiff, to further maintain the issue on his — joined, offered as a witness one Charles B. Vallette, who testified that he was acquainted with the plaintiff and was a passenger on one of the cars of defendant company at the time the plaintiff was injured; that he was going from the city to Georgetown and was sitting on the north side of the car; that he conversed with the plaintiff, and when the car reached the corner of 19th street the said plaintiff motioned to the conductor to stop the car, and got up and went towards the rear door: that the conductor was standing on the north side of the car, on the inside, with his back against the door; that he noticed there were four or five persons on the platform at the time, but could not state the exact number; that the conductor was making up his trip-slip at the time; that he heard the bell of the car ring but once; that he did not see the accident and did not see the plaintiff fall, but that some passenger in the car told him that his friend had fallen off the car.

35 The plaintiff, to further maintain the issues on his part joined, offered as a witness one Jeffrey Jefferson, who testified that at the time of the accident he was standing on the northwest corner of 19th street and Pennsylvania avenue, in company with a friend, smoking; that he heard a gentleman call for

help, and went to his assistance; that he helped him up, went into the drug store and got a chair, into which the plaintiff was placed, and then went to the livery stable where he was employed as a foreman and "hooked" up a carriage and took the plaintiff to his home; that he assisted in undressing him and remained at the house until a doctor arrived; that while the plaintiff was sick he would sometimes go to the house to see him, and after the said plaintiff got so that he could ride about he would go there with a carriage and drive him out; that he did not see the plaintiff fall, but that he saw him after he was down on the ground and went to his assistance; that he was not paying particular attention to the car and did not notice whether the bell was rung either for the car to stop or to go ahead; that he did not notice whether or not the car stopped after the accident.

The plaintiff, to further maintain the issues on his part joined, offered as a witness D. W. Bliss, who testified that he was a physician, practising his profession in the District of Columbia; that in the spring of 1882 he was called upon to attend the plaintiff for an injury received by falling upon the protuberance of the hip-joint; that a good deal of inflammation of the hip-joint was produced, the hip was a great deal swollen, and plaintiff was unable to bear any weight upon it; that after the inflammation subsided the left leg was found to be shorter than the other; that there was a fracture of the bottom of the cavity that the head of the bone rested in, which allowed the bone to pass deeper in and shorten the limb; that in consequence of plaintiff's injuries he suffered great pain and was confined to his bed for a considerable time; that plaintiff could not use that limb as well as before the accident; that he was obliged to use crutches for two or three and possibly four months;
36 that while he was under treatment he was unable to attend to any business except what was brought to him; that the limb would be subject to the effects of atmospheric changes; that his locomotion was impaired, and the shortening of the limb would probably be permanent; that it would require a heavy fall upon the protuberance of the thigh-bone to produce fracture of the cavity in which this bone rested.

The witness further testified, in answer to interrogatories propounded to him by counsel for the plaintiff, as follows:

Q. Perhaps I may state for the purpose of my inquiry that there are two kinds of falls. There is a fall when a man simply topples over or falls over from his feet, and there is a fall where he is thrown from some projection or by some applied force. To which of these two classes of falls would you attribute an accident such as you found in this patient?

A. A fall when the body is in rapid motion would give him a more profound blow.

Mr. TOTTEN:

Q. It would hit harder?

A. It would be greater than if he fell directly.

By Mr. Cook:

Q. From the character of this fracture, to which of these two classes of falls would you attribute this injury?

A. He might have a fracture of that character by a direct fall, but would be more likely to receive it if he was going rapidly and was arrested in his progress. In that case, by striking upon the protuberance, he would be more likely to have a severe blow than he would from falling directly. He might have it from either, particularly in a man of his years, as the bones are very brittle.

And then the plaintiff rested.

And thereupon the defendant, to maintain the issue on its
37 part joined, gave evidence to the jury by Edwin D. Young, conductor of the car, tending to show—

That the car upon which the plaintiff was riding at the time of the accident left the Navy Yard on its trip to go to Georgetown at 9 o'clock and 10 minutes in the evening, and that it arrived at 19th street about 50 minutes after 9, and that passengers were taken on and left off and got off from time to time along the route, and that altogether during the trip thirty-five (35) passengers rode upon the car; that they got on or off from time to time, and that a majority got off at the junction of the street railway at the corner of 15th street and New York avenue, and that at the time the accident happened not more than 5 or 6 passengers were inside the car; that the plaintiff had been in the habit of riding on defendant's cars and getting off at the junction of 19th street northwest and Pennsylvania avenue; that he was in the habit of getting off while the car was in motion; that when the car reached said 19th street the plaintiff, with his hand, signalled to the conductor to stop the car, and the conductor rang the bell and the speed of the car began to decrease and slow down, and that the conductor was at the time he was so signalled to stop standing on the rear platform of the said car; that there was no person at the time the bell was so rung standing on the rear platform except the conductor and a small boy; that the plaintiff, without waiting for the car to stop after so signalling the conductor, immediately went out on the rear platform and stepped down upon the step, at the same time holding onto the iron railing on the car, and whilst the car was still in motion and moving at a slow rate of speed, nearly at a standstill, the plaintiff stepped off, and after he had let go of the car he (the conductor) pulled the bell to go on again, and as the plaintiff turned he fell—as he stepped on the pavement he turned and fell; that he did not ring the bell for the car to start until after plaintiff had stepped on the street and let go of the car; that at the time the plaintiff stepped off the car
38 was nearly to a standstill—just moving—but seeing the plaintiff fall the conductor immediately again rang the bell and the car stopped after going about two lengths; that the conductor went back to the plaintiff and asked him if he was hurt, and plaintiff said he had twisted his ankle and told the conductor to go on; that the car remained standing on that occasion for about two

minutes; that there were several persons about the plaintiff assisting him, and the conductor thereupon continued his journey; that the conductor was not engaged in making up his accounts at the time the plaintiff undertook to get off his car, and that he usually began to make up his accounts of his trip about 23d street, when there were few passengers on his car, and that when he had many passengers on the car he did not usually make up his accounts until he arrived in Georgetown.

Upon cross-examination the said witness testified as follows:

Among other things that he was, at the time of the trial, in the employ of the defendant as conductor, but had not been all the time since the accident; that he could not tell how many passengers got on or off the car at any particular point on the route; that he did not remember what he was talking about with the boy on the platform at the time of — accident; that he waited until plaintiff let go of the car and then pulled the bell again; that he gave plaintiff no directions, but just let him alone; that he saw him fall after he got on the pavement; that he (plaintiff) did not fall off the car at all, but reached the ground safely and then fell as he made the first step; that the plaintiff did not wait for the car to stop, but stepped off, and then he, the conductor, rang the bell for the car to go forward again, and at that time plaintiff had not fallen, but had just turned; that the car was going at a snail's movement when plaintiff go- off; that plaintiff fell after reaching the ground and as he turned to go up 19th street; that it was safe for plaintiff to get off the car when he did, and that he fell after he got off.

39 And thereupon the plaintiff was himself recalled in rebuttal and testified as follows:

Q. You may state whether the conductor who has just been on the stand, according to your recollection, approached you after you sustained your injury and entered into a conversation with you, and whether you told him nothing was the matter with you; that you had only twisted your ankle.

Mr. DAVIDGE: I object to that. They brought it out themselves on cross-examination.

The COURT: Still there is a conflict in the testimony as to the conversation, although the other side brought it out on the cross-examination. * * * I think it is admissible.

Mr. DAVIDGE: We reserve an exception.

By Mr. COOK: Now you may answer.

A. I never saw the conductor at all after I fell until I saw him here.

Q. Did you have any conversation with him?

A. Not at all, sir. In the first place, my ankle was not hurt at all, so I could not have told him that my ankle was sprained.

Q. You may state whether, as a matter of fact, you slipped or fell on the pavement or the street.

A. I did not, sir. I fell from the car and struck my hip.

Q. You may also state whether when you got off you faced to the west and then turned your face to the north, and then fell.

—. I got down with my face to the west, of course, because I was getting off between these two points, or was thrown off, and when the car started up it turned me so that I fell on my left hip. He said a year ago that I fell on my right side. I did not; I fell on my left side.

To which evidence as the same was given the defendant objected as aforesaid, and — the answer- thereto respectively the counsel for the defendant objected as noted, but the court overruled said
40 objection and allowed the evidence to be given to the jury; to which ruling of the court the counsel for the defendant then and there duly excepted, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 1st bill of exceptions, which is accordingly done, now for then, this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

And thereupon, after the evidence set out in the preceding bill of exceptions, made part hereof, the plaintiff called in rebuttal a witness, JEOFFREY JEFFERSON, who testified as follows:

Q. You have been sitting in the court-room for the last few minutes?

A. Yes, sir.

Q. You heard what this conductor testified to about a conversation between him and Mr. Harmon when he was hurt?

A. He said that he stopped the car and came back to him, and Mr. Harmon said to him there was nothing the matter with him, but that his ankle was sprained.

Q. Did you hear any such conversation when you were helping Mr. Harmon?

A. I did not.

Q. If there had been such a conversation would you have heard it?

A. I think I would. I was the closest man to him. I had him in my arm.

This was all the evidence in the case.

Thereupon, the evidence on both sides having been closed and given to the jury, the plaintiff, by his counsel, prayed the court, upon the evidence set forth in the first bill of exceptions and that of Jeoffrey Jefferson in rebuttal—all which evidence is hereby made part of this exception—to instruct the jury as follows, to wit:

If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and that while plain-
41 tiff was waiting for the car to stop, and before it had fully stopped, the car started suddenly forward through the negligent act of the conductor or driver, and that the plaintiff was thereby and without any negligence on his part thrown from the car and injured, then he is entitled to recover.

To the granting of which prayer the defendant, by its counsel, objected, but said objection was overruled, and the said prayer was allowed by the court and read to the jury; whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its second bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the counsel for the plaintiff moved the court, on the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, to instruct the jury as follows, to wit:

If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for plaintiff to get off, and that thereupon the car slowed and the plaintiff went out on the platform and, while the car was moving very slowly, stepped down on the step of the car to be in readiness to step off when the car should fully stop, and that instead of stopping fully the car moved suddenly forward in consequence of the negligent act of conductor or driver and he was thereby thrown off and injured, it would be for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the conduct of the plaintiff caused or contributed to his injury; and if they further believe that the plaintiff did under the circumstances what
42 an ordinarily prudent man would have done, then he was not guilty of contributory negligence and would be entitled to recover.

To the granting of which prayer the defendant, by its counsel, objected, but said objection was overruled and the said prayer was allowed by the court and read to the jury; whereupon the defendant, by its counsel, duly excepted to the granting and reading of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 3d bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the counsel for the plaintiff moved the court, on the evidence set forth in and made part of the first and second bills of exception, which evidence is made part of this exception, to instruct the jury as follows, to wit:

If the jury find for the plaintiff they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent they will also find for him such damages as will fully compensate

him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will suffer in the future. In determining this as to the future they will consider plaintiff's bodily vigor and age as shown by the evidence adduced.

To the granting of which prayer the defendant, by its counsel, objected, but said objection was overruled and the said prayer was allowed by the court and read to the jury; whereupon the defendant, by its counsel, duly excepted to the granting and read-
43 ing of said prayer, and the said exception was noted at the time upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 4th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, to instruct the jury as follows:

The burthen of proof is upon the plaintiff to satisfy the jury that he sustained the injury which is the subject of this action by reason of the negligence of the defendant and without contributory negligence on his part.

But the court refused to grant said prayer as it was prayed and granted it omitting the words "and without contributory negligence on his part."

To which ruling of the court the defendant, by its counsel, duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with the qualification and omission thereunto made, and the said exception was at the time noted upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 5th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

And thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the 1st and 2d bills of exception, which evidence is hereby made part of this exception, to instruct the jury as follows:

If the jury shall find that the platform was crowded, and
44 that the plaintiff made his way through the crowd and got down from the platform and onto the step below and stood on the step without any means of support, with a person on each side and a crowd behind, and whilst the plaintiff was so standing a sudden movement of the car caused the plaintiff to fall from the step onto the pavement, whereby he received the injury alleged, then the plaintiff is not entitled to recover.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted and the exception was at the time noted upon the minutes of the court, and the defendant's

counsel prays the court to sign and seal this its 5th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is made part of this exception, prayed the court to instruct the jury as follows:

If the jury shall find that the platform was crowded, and that the plaintiff made his way through the crowd and got down from the platform and onto the step below and stood on the step without any means of support, with a person on each side and a crowd behind, and that whilst the plaintiff was so standing a sudden movement of the car caused the plaintiff to fall from the step onto the pavement, whereby he received the injury alleged, then it will be for the jury to determine from the evidence whether or not the plaintiff is chargeable with contributory negligence through such acts; and if the jury shall find that he is so "chargeable," then the plaintiff is not entitled to the verdict.

45 But the court refused to grant said prayer, except with the qualification and modification as follows, to wit:

By inserting after the word chargeable, in the last line of said prayer, the following:

"And that such negligence contributed to the injury."

To which ruling of the court the defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting and giving of said prayer to the jury with the qualification and modification thereunto made, which exception was at the time noted upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 7th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

And thereupon the defendant, by its counsel, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, — to instruct the jury as follows:

If the jury shall be satisfied from the evidence that when the plaintiff signalled to the conductor to stop the car the conductor rang the bell for that purpose, and that the car immediately began to slow down its speed, and that the plaintiff, without waiting for the car to stop, undertook and did step from the car whilst it was still in motion and was "injured," he cannot recover and the defendant is entitled to a verdict.

But the court refused to grant said prayer as prayed and except with the modification by inserting after the word "injured" in the sixth line of said prayer the following words: "In consequence thereof."

So that the said prayer will read as follows:

46 If the jury shall be satisfied from the evidence that when the plaintiff signalled to the conductor to stop the car the

conductor rang the bell for that purpose and the car immediately began to slow down its speed, and that the plaintiff, without waiting for the car to stop, undertook and did step from the car whilst it was stil- in motion, and was injured in consequence thereof, he cannot recover, and the defendant is entitled to a verdict.

To which ruling of the court the defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting and giving of said prayer with the qualification and modification thereunto made, which exception was at that time noted upon the minutes of the court, and the counsel for the defendant prays the court to sign and seal this its 8th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, upon the evidence set forth in and made a part of the first and second bills of exceptions, which evidence is hereby made part of this exception, prayed the court to instruct the jury as follows, to wit:

It was not the duty of the conductor of the street car from which the plaintiff was injured to exercise any physical control over the plaintiff in getting off the car, and if the jury shall find from the evidence that when the conductor rang the bell to stop the car and when the plaintiff passed out of the car upon the platform and upon the step the conductor was standing on the inside of the car, and that the platform was crowded with passengers, and that a boy was on the step next to the car and a man was also on the other end of the step in such a position as to prevent the plaintiff from supporting himself by either of the railings at the time the plaintiff stepped down upon the step and that the car was in
47 motion, and that while so on the step the plaintiff was thrown off the car by a sudden jerk or start of the car, caused by the ringing of the bell or otherwise, then the plaintiff cannot recover.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 9th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the 1st and 2d bills of exceptions, which evidence is hereby made part of this exception, to instruct the jury as follows:

There is evidence in this cause from which the jury may infer contributory negligence on the part of the plaintiff, and if the jury find the same the plaintiff is not entitled to recover.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the

defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 10th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, to instruct the jury as follows:

48 If the jury shall be satisfied from the evidence that *that* the plaintiff at the time he desired to leave the defendant's car signalled to the conductor to stop, and that the conductor rang the bell for that purpose, and that the plaintiff immediately and without waiting for the car to stop started out of the car and stepped on the platform and pressed his way through a crowd of people standing on the platform and stepped down upon the step of the car between the persons—one standing on each end of the step—the speed of the car getting slower and slower, but whilst the car was still in motion, and from that position fell or stepped upon the surface of the street and was injured, the plaintiff is not entitled to recover, and the verdict must be for the defendant.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 11th exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, to instruct the jury as follows:

It was not the duty of the conductor of the street car from which the plaintiff was injured to exercise any physical control over the plaintiff in getting off the car, and if the jury shall find from the evidence that when the conductor rang the bell to stop the car and when the plaintiff passed out of the car upon the platform and upon the step the conductor was standing on the inside of the car, and

49 that the platform was crowded with passengers, and that a boy was on the step next to the car and a man was also on the other end of the step in such a position as to prevent the plaintiff from supporting himself by either of the railings at the time the plaintiff stepped down upon the step — the plaintiff was thrown off the car by a sudden jerk or start of the car, caused by the ringing of the bell or otherwise, the plaintiff cannot recover.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the

defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 12th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

Thereupon the defendant, by its counsel, prayed the court, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this ex-tion, to instruct the jury as follows:

There is evidence in this cause from which the jury may find that the injury to the plaintiff was sustained in consequence of his voluntarily stepping off the car whilst in motion instead of his being thrown off the car by the sudden starting, as given in evidence by the plaintiff.

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 13th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

50 Thereupon the defendant, upon the evidence set forth in and made part of the first and second bills of exceptions, hereby made part of this exception, prayed the court to instruct the jury as follows:

It was not the duty of the conductor of the street car from which the plaintiff was injured to exercise any physical control over the plaintiff in getting off the car, and if the jury shall find from the evidence that when the conductor rang the bell to stop the car and when the plaintiff passed out of the car upon the platform and upon the step the conductor was standing on the inside of the car, and that the platform was crowded with passengers, and that a boy was on the step next to the car and a man was also on the other end of the step in such position as to prevent the plaintiff from supporting himself by either of the railings at the time the plaintiff stepped down upon the step, and that the car was in motion, and that while so on the step the plaintiff was thrown off the car by a sudden jerk or start of the car, caused by the ringing of the bell or otherwise, then it will be for the jury to determine whether or not the plaintiff is chargeable with contributory "negligence," and if the jury shall find that he is so chargeable the verdict must be for the defendant.

But the court refused to grant said prayer except with the qualification and modification following:

By inserting after the word negligence in the 3rd line from the end of said prayer, after the word "negligence," the following:

"By such acts."

And by inserting after the word chargeable in the 2d line from the end of said prayer the following:

"And that said negligence contributed to the accident."

So that the said prayer shall read as follows:

51 * * * Then it will be for the jury to determine whether or not the plaintiff is chargeable with contributory negligence *by such acts*, and if the jury shall find that he is so chargeable, *and that such negligence contributed to the accident*, the verdict must be for the defendant.

To which ruling of the court the defendant duly objected as well *as* to the refusal to grant said prayer as asked as to the granting of said prayer and the reading of the same to the jury with the modifications and qualifications thereunto made; but the court overruled said objection and refused to give said instruction as asked, and the same was read and given to the jury with the modifications and qualifications thereunto made, and the defendant, by its counsel, duly excepted, and the exception was noted at the time upon the minutes of the court, and counsel for the defendant prays the court to sign and seal this its 4th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

At the instance of the counsel for the defendant the following instructions prayed with other instructions rejected by the court were given, to wit:

First. If from the evidence the jury shall find that the injury would not have occurred if the plaintiff had waited until the car stopped, and that the injury was caused by the plaintiff attempting to get off the car whilst in motion, then the plaintiff contributed to the injury and is not entitled to recover.

Second. If the jury shall be satisfied from the evidence that the plaintiff himself so far contributed to the accident by his own negligence or want of ordinary care and caution that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover, and the verdict must be for the defendant.

52 And at request of plaintiff's counsel said two instructions are made part of the record in this cause this 21st day of January, 1888.

W. S. COX, *J.* [SEAL.]

Thereupon, upon the evidence set forth in and made part of the first and second bills of exceptions, which evidence is hereby made part of this exception, the court upon its own motion instructed the jury as follows:

GENTLEMEN OF THE JURY: [*This case suggests four theories as to the cause of this accident which is complained of under the declaration and as many propositions of law applicable to them.*] [*How far there is sufficient evidence in the case or any evidence to support any one of these theories I shall leave to you.*] [*In the first place, the testimony on the part of the defendant is to the effect that the plaintiff had descended from*

the car (in safety) and that he stepped and fell from some cause not attributable to the conduct of the defendant, but from some unforeseen accident.] If you find that to be the case it is perfectly apparent that there is no ground of action at all. *There is evidence in the case directly to that effect which is to be construed by you and weighed in connection with all the other evidence before you.* If the plaintiff undertook, after requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving necessarily some imprudence, so I take it, and if that act was the cause of his falling it would amount, in my judgment, to contributory negligence and would defeat his action. [*If you are satisfied that it was an act of carelessness on his part to come out on the crowded platform and step down on the step while it was already occupied by other people, so that he had to stand between them and had no means of supporting himself and in consequence of that alone he fell from the car without any other cause—*
53 *I say if you are satisfied that was an act of carelessness on his part, and that it was the direct cause of his falling of the car, that would also amount to contributory negligence, which would defeat his right to recover.*] [Fourthly, *if you are satisfied that while he was upon the step, even though it might have been imprudent in him to go there, and yet if the conductor had allowed the car to stop he would have alighted in safety and no acccident would have happened, but that instead of so doing the conductor either negligently failed to observe whether or not he had allighted or seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, and that threw him down and was the immediate cause of his falling, and that the accident would uot have happened but for that fact, then I hold that the company is responsible.*]

Now, these are the four contingencies which you are to contemplate. You may take the case without any other instructions.

And to such parts of the foregoing charge as are inclosed in brackets and italicised by being underscored with pen and ink the counsel for the defendant excepted separately, and the justice presiding at the time noted the said exceptions separately upon his minutes before the jury retired to consider of their verdict, and counsel for defendant prayed the court to save to him each of said exceptions separately in this single bill of exceptions, to have the same force and effect as if each of said exceptions were set forth in a separate bill of exceptions, which the court granted, and the counsel for the defendant prays the court to sign and seal this its 15th bill of exceptions, which is accordingly done now for then this 21st day of January, A. D. 1888.

W. S. COX, *J.* [SEAL.]

54 *Proceedings in General Term.*

MONDAY, *Oct.* 1*st*, 1888.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning first Monday, October 1st, 1888.

Present, presiding: Mr. Chief Justice E. F. Bingham and Associate Justices Hagner and Merrick.

* * * * * * *

MONDAY, *Jan'y 7th*, 1889.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justice James.

JOHN H. HARMON
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } At Law. No. 24010.

55 And now comes the attorneys for the plaintiff and suggests to the court that since the entry of the judgment in this cause by the circuit court and during the pendency of the cause in the general term the plaintiff, John H. Harmon, has departed this life; and it appearing to the court that Leon Tobriner has been appointed administrator of the estate of the said John H. Harmon by the special term of this court for orphans' court business, and that he has qualified as such, it is this 7th day of January, 1889, ordered that this cause be, and the same is hereby, revived in the name of Leon Tobriner, as administrator as aforesaid, and that he be substituted as plaintiff instead of the said John H. Harmon.

(Signed) E. F. BINGHAM,
Chief Justice.

Assignment of $\frac{2}{3}$ *Interest in Judg't. Filed June* 10, 1889.

JOHN H. HARMON
vs.
THE WASH. & G. T. R. R. Co. } At Law. No. 24010.

56 Know all men by these presents that I, John H. Harmon, of the city of Washington, in the District of Columbia, standing indebted to Luther H. Pike, attorney-at-law, of said city and District, for moneys advanced to me and upon my promise to pay him a sum equal to one-half of whatever I may recover in my certain suit now pending in the supreme court of said District against the Washington and Georgetown Railroad Company for injuries inflicted upon me by that company on the evening of April 30th, 1882, in said city of Washington, as compensation for the services he has already rendered and is hereafter to render me in and about said suit, do, upon and for and in consideration of said indebtedness,

assign, transfer, and set over to him, the said Luther H. Pike, two-thirds of whatever sum I may recover in and by reason of said suit against said company, hereby stipulating and agreeing that this assignment shall be and operate upon the judgment I may recover as a lien in his favor.

57 Witness my hand and seal, at the city and District aforesaid, this twenty-third day of July, A. D. 1883.

(Signed) JOHN H. HARMON. [SEAL.]

A true copy.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

Proceedings in General Term.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning fourth Monday of April, 1889.

Present, presiding: Mr. Justice Hagner and Mr. Justice James. Absent: Chief Justice Bingham, holding circuit court, division No. 1; Mr. Justice Montgomery, holding circuit court, division No. 2; Mr. Justice Cox, holding the equity court, and Mr. Justice Bradley, holding the criminal court.

* * * * * * *

58 WEDNESDAY, *June* 12, 1889.

Session resumed pursuant to adjournment.
Present: Justices Hagner, James, and Merrick.

* * * * * * *

LEON TOBRINER, Administrator of the Estate of John H. Harmon, Deceased,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.
} At Law. No. 24010.

Now again come here the parties, by their respective attorneys, and thereupon this case came on to be heard by the court in general term upon the defendant's appeal from the judgment of the circuit court pronounced herein, and was argued by the attorneys for the respective parties; upon consideration whereof, and it appear-

59 ing to the court here that there is no error in the rulings of the justice who presided at the trial, and the attorney for the defendant having in open court abandoned his motion for a new trial on a case for insufficient evidence and excessive damages, it is, this 12th day of June, 1889, considered and ordered by the court in general term that the said judgment of the circuit court be, and the same is hereby, affirmed; and Henry Hurt having, as surety for the defendant, signed the undertaking given by it on said appeal and having thereby and by the terms thereof entered his appearance and submitted to the jurisdiction of the court and consented that its

judgment may be pronounced herein against him and the said defendant jointly, it is further considered and ordered by the court that the said plaintiff, Leon Tobriner, administrator of the
60 estate of the said John H. Harmon, deceased, do have and recover against the said The Washington and Georgetown Railroad Company and Henry Hurt the sum of six thousand five hundred dollars, the amount of the said judgment of the said circuit court, with interest thereon from the 1st day of December, 1887, when it was entered, until paid, and the cost by the said plaintiff and the said John H. Harmon expended in the prosecution of this suit, to be taxed by the clerk, and that the plaintiff do have execution thereof.

For the court :

CHAS. P. JAMES, *Justice.*

61 (Copy.)

Filed Jun- 24, 1889.—R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia, the 22d Day of June, 1889

JOHN H. HARMON'S ADMINISTRATOR *vs.* THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.	No. 24010. Law. In Error.

Know all men by these presents that we, The Washington and Georgetown Railroad Company and Henry Hurt and George T. Dunlop, are bound unto the above-named plaintiff, Leon Tobriner, administrator of John H. Harmon, in the sum of twelve thousand ($12,000.00) dollars, to be paid to the said Leon Tobriner, administrator of John H. Harmon, his executors or administrators ; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 22d day of June, 1889.

Whereas the above-named The Washington and Georgetown Railroad Company and Henry Hurt have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named The Washington and Georgetown Railroad Company and Henry Hurt shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void ; otherwise the same shall be and remain in full force and virtue.

WASHINGTON & GEORGETOWN R. R. CO.,
P'r H. HURT, *P't.* [SEAL.]
HENRY HURT. [SEAL.]
GEO. T. DUNLOP. [SEAL.]

Sealed and delivered in presence of—
JOHN F. STAKE.

Approved June 24, 1889.

E. F. BINGHAM,
Chief Justice.

Satisfactory.

C. C. COLE.

62 *Writ of Error to the Supreme Court of the United States.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Leon Tobriner, administrator of John H. Harmon, plaintiff, and The Washington and Georgetown Railroad Company, defendant, and Henry Hurt, its surety, being No. 24010 at law, a manifest error, hath happened, to the great damage of the said defendant and surety, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24 day of June, in the year of our Lord 1889, and of the Independence of the United States the one hundred and thirteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

63 *Citation to the Supreme Court of the United States.*

The United States of America to Leon Tobriner, administrator of John H. Harmon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington and Georgetown Railroad Company and Henry Hurt are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of

error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and eighty-nine.

E. F. BINGHAM,
Chief Justice.

Service of the foregoing citation accepted this 24th day of June, 1889.

C. C. COLE,
Att'y for Def't in Error

On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared before me the subscriber, —— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

[Seal Supreme Court of the District of Columbia.]

—— ——.

64 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 25 day of June, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 25 day of June, 1889.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing

certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 25 day of June, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 13,677. District of Columbia supreme court. No. 116. The Washington & Georgetown Railroad Company and Henry Hurt, plaintiffs in error, *vs.* Leon Tobriner, administrator of John H. Harmon, deceased. Filed October 1st, 1889.

147 U.S.

FILED
JAN 16 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY AND HENRY HURT,
PLAINTIFFS IN ERROR,

v.

LEON TOBRINER, ADMINISTRATOR OF JOHN H. HARMON, DECEASED.

No. 116.

BRIEF FOR PLAINTIFFS IN ERROR.

W. D. DAVIDGE,
ENOCH TOTTEN,
for Plaintiffs in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY AND HENRY HURT, *Plaintiffs in Error*,

v.

LEON TOBRINER, ADMINISTRATOR OF JOHN H. HARMON, DECEASED.

No. 116.

Brief of Plaintiffs in Error.

This action was brought by the plaintiff below, a passenger on a street railroad car of the defendant, to recover damages for personal injuries sustained by being thrown off the car, and, as alleged by the declaration, "without carelessness or negligence" on the part of the plaintiff, and "through the carelessness and negligence of the defendant" (R. 1, 2).

Plea, the general issue (R. 3).

Verdict for plaintiff, damages $6,500, and judgment (R. 8). Exceptions upon trial (R. 12–29).

The bill of exceptions sets forth all the evidence in the case (R. 21).

The exceptions were heard in general term on motion for a new trial (R. 9), and that court rendered judgment (R. 31) in favor of the defendant in error, who, as administrator of the plaintiff, had, upon suggestion of his death, been substituted as plaintiff in his stead (R. 30), affirming the judgment of the circuit court (R. 31.) Judgment in general term was further rendered against the defendant and Henry Hurt, its surety (R. 11), for the amount of the judgment of the circuit, " with interest from the 1st day of December, 1887, when it was entered, until paid," and for costs (R. 31–32). The judgment of the circuit did not bear interest (R. 8).

The cause was then brought here, by writ of error, by the defendant below and Henry Hurt (R. 32, 33, 34).

The Case.

The plaintiff below, a man about sixty-four years of age, took passage, opposite the National Hotel, in this city, in one of the cars of the railroad company to go to his home, on the west side of 19th street west.

As the car neared that street he signalled to be let off, and the conductor promptly rang the bell and the car began to slow, but was still in motion when it reached the building line on the west side of the street. At this point the accident occurred, and the only evidence as to how it occurred is that of the plaintiff and of the conductor.

There were in all only five witnesses examined at the trial—for the plaintiff, himself and three others; and for the defendant, the conductor of the car.

Of the four witnesses in behalf of the plaintiff one swore he was in the car but did not see the accident (R. 17); another did not see the plaintiff until after the accident and when he was lying in the street (R. 17, 18),

and another, Dr. Bliss, a surgeon, was called to attend the plaintiff at his residence, and testified only as to the nature and extent of his injury (R. 18). Thus the question how the accident occurred was narrowed down to the statements of the plaintiff and conductor, and these statements cannot be reconciled.

According to the evidence of the latter the plaintiff was not thrown from the car but, after the signal to stop was given and the car was slowing, went out to the rear platform and without waiting for the car to stop, of his own accord, and holding on to the iron railing of the car, stepped down upon the step and then upon the street, and after the plaintiff had alighted and let go the car, apparently in safety, the conductor gave the signal to go ahead, but seeing the plaintiff fall as he turned to go up the street the bell was again rung and the car stopped within two lengths from where the plaintiff had alighted.

The case thus presented was that of a party voluntarily undertaking to get off a car in motion, and, of course, taking the attendant risk.

The court so ruled (R. 28, 29), and whatever the probability of this evidence, as the jury found against it, mention is here made of it simply as part of the history of the case.

On the other hand the evidence of the plaintiff was entirely different, and as it is in respect of this evidence, assuming it to be true, that error is assigned, it is proper to state it with some degree of particularity. The plaintiff was born in 1818, and hence when the accident occurred was sixty-four years old, less a few days (R. 12, 13.) His business being at the Capitol, he had been in the habit of riding twice a day to and from that place for five years (R. 13). The time of the accident was about 9 o'clock in the evening, in the month of April (R. 12). When the

signal to stop was given, the conductor promptly rang the bell and the car began to slow (R. 13.) At or about the time the bell was rung the plaintiff got up and went to the rear door of the car, which was opened for him by the conductor, who was standing at the door, in the light, on the north side of the door, looking up his accounts (R. 12). There were six or eight passengers inside the car, but the platform was crowded (R. 13). The plaintiff made his way through the crowd and down to the step, occupied by a man and a boy at each end, the car almost at a stand still; that he could not swing off and could not get back, and just then the bell was rung and the car started and threw him off on the pavement (R. 12).

The conductor did not slow up sufficiently, and when the plaintiff got through the crowd the car was a little past the corner of 19th street, on the west side (R. 13).

When the plaintiff came out of the car he saw standing on the step a man and a boy, the latter at one end holding on to the railing of the car and the former at the other end holding on to the railing of the dash-board (R. 12, 13).

"Q. You saw you could not get hold of anything?
"A. Yes, sir." (R. 15).

The plaintiff had his cane in his right hand and "crowded down between a man and a boy to the lower step" (R. 14).

It did not occur to him that it was a dangerous experiment to go down there. He "supposed the car would stop." He "supposed he could swing off until I [he] got to the step" (R. 14).

"Q. Could you swing off when the boy was standing there?

"A. I could not then.
"Q. You saw that was dangerous, didn't you?
"A. The car was almost at a stand.
"Q. You saw you could not get hold of anything?
"A. Yes, sir.
"Q. How could you swing off?
"A. I didn't swing off.
"Q. You said you thought you would?
"A. I said I thought I could; but when I got there, no sooner had I put my foot to the step than the bell rang and the car gave a jerk.
"Q. Did you have both feet on the step when the bell rang?
"A. I think I did.
"Q. You did not have hold of anything?
"A. No, sir.
"Q. The car was still in motion?
"A. The car was almost at a standstill when he rung the bell and the car started.
"Q. Still it was moving?
"A. Slightly moving" (R. 14, 15).

On re-examination (R. 17):

"Q. When did you first see the boy and man on the step?
"A. I saw them when I got through the crowd. I saw the boy there.
"Q. When you stepped on that step was it to wait for the car to stop, or was it to step off?
"A. The car was almost stopped.
"Q. *You simply got there to step off when the car stopped?*
"A. YES, SIR."

Recross-examination (R. 17):

"Q. There was nobody else thrown off on that occasion but yourself?
"A. No, sir."

Thus the case, according to the evidence of the plaintiff himself, the only evidence in support of the declaration, was that the plaintiff, seeing the step occupied by the man and the boy holding on to the railings at each end, instead of waiting for the car to stop, voluntarily placed himself in a position of danger by going down upon the step when he had no means of support, and whilst there was thrown off by the sudden starting of the car, and that had he waited for the car to stop or had he, even upon the step, had any means of support he would not have been injured.

The plaintiff further testified as to the nature and extent of the injury received (R. 12), as did also Dr. Bliss (R .18).

The case being closed, the court granted the prayers offered by the plaintiff—two relating to negligence and the third to the measure of damages (R. 21, 22). The two former left the question of the negligence of the plaintiff to the jury as matter of fact and in a manner well calculated to mislead the jury. The third instructed the jury that if they found for the plaintiff he was entitled to recover for "the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, loss of time, and expenses of case that naturally and proximately resulted from the injury," and, more than this, that if the injury was found to be permanent the plaintiff was entitled to "such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience and the loss of time he will suffer in the future."

To these rulings the defendant duly excepted.

On behalf of the defendant, prayers were offered to the effect that it was contributory negligence in law for the plaintiff, whilst the car was in motion, to go upon and stand on the step, knowing that it was occupied by the man and the boy holding the railings at each end, and

without any means of support. All these prayers were rejected, and the question of negligence on the part of the plaintiff, and the further question, how far such negligence contributed to the injury, declared to be for the jury to determine (R. 23, 25, 26, 27, 28).

The defendant further prayed an instruction that the burthen of proof was upon the plaintiff to satisfy the jury that he sustained the injury through the negligence of the defendant, and without contributory negligence on his part. This prayer was also rejected as prayed, but granted with the omission of the words "and without contributory negligence on his part" (R. 23).

The above rulings rejecting the prayers of the defendant were duly excepted to. They are all that need special mention in this statement.

Coming now to the charge (R. 28):

The court said in substance that the case suggested four theories as to the cause of the accident, and as many propositions of law. "How far there is sufficient evidence in the case, or any evidence, to support any one of these theories, I shall leave to you." The learned judge then proceeds to state the four "theories."

First. That the plaintiff alighted in safety from the car and then fell from "some cause not attributable to the conduct of the defendant, but from some unforeseen accident." (This was a misconception of the evidence of the conductor (R. 20), who does say the plaintiff "did not fall off the car at all, but reached the ground safely, and then fell as he took the first step." His meaning is manifest, that the plaintiff apparently reached the ground in safety. As to any *new* cause he says not a word). This theory, if found, would, the learned judge continues, bar a recovery.

Second. If the plaintiff undertook to descend from the

car whilst in motion, and was thereby injured, that also would be "contributory negligence" and defeat the action.

Third. If it was an act of carelessness for the plaintiff to come out on the crowded platform and step down on the step while it was already occupied by other people, so that he had to stand between them and had no means of supporting himself, and in consequence of that *alone and without any other cause* he fell from the car; if the act was one of carelessness and the direct cause of his falling, that would defeat his right to recover.

Fourth. If it was imprudent for him to go upon the step, and yet if the conductor had allowed the car to stop he would have alighted in safety and no accident would have happened, and if, instead of so doing, the conductor either negligently failed to observe whether the plaintiff had alighted, or, seeing him on the step, neglected to wait until he had alighted and gave the signal to go on, and that in consequence there was a sudden jerk of the car that threw the plaintiff down and was the immediate cause of his falling, and that the accident would not have happened but for such fact, the defendant is responsible.

Assignment of Errors.

The court erred—

First. In leaving the question of contributory negligence to the jury by giving the first and second instructions asked by the plaintiff as follows (R. 21, 22):

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and *that while plaintiff was waiting for the car to stop*, and before it had fully *stopped*, the car *started sud-*

denly forward through the negligent act of the conductor or driver, and that the plaintiff was thereby *and without any negligence on his part* thrown from the car and injured, then he is entitled to recover.

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for plaintiff to get off, and that thereupon the car slowed and the plaintiff went out on the platform and, while the car was moving very slowly, stepped down on the step of the car to be in readiness to step off when the car should fully stop, and that instead of stopping fully the car moved suddenly forward in consequence of the negligent act of conductor or driver and he was thereby thrown off and injured, it would be for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the conduct of the plaintiff *caused or contributed to his injury;* and if they further believe that the plaintiff did under the circumstances what an *ordinarily prudent man would have done*, then he was not guilty of contributory negligence and would be entitled to recover."

And by refusing to declare as prayed by the defendant that the plaintiff was in law guilty of contributory negligence, as prayed by the defendant (R. 23, 25, 26).

Second. In ruling that in the present case, where the right to recover depends exclusively upon the evidence of the plaintiff, party and sole witness, the burthen of proof did not rest upon him as to the absence of contributory negligence (R. 23).

Third. In ruling, in the absence of evidence that the conductor knew or could with the care and prudence required of him have known the dangerous position of the plaintiff on the step, that the qualification of the general rule, that contributory negligence is a bar to the action, was applicable to the present case, as follows (R. 29):

"*If you are satisfied that while he was upon the step*,

even though it might have been imprudent in him to go there, and yet if the conductor had allowed the car to stop he would have alighted in safety and no accident would have happened, but that instead of so doing the conductor either negligently failed to observe whether or not he had alighted, or seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, and that threw him down and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

Fourth. The leaving to the jury the question how far there was any evidence to support the foregoing qualification of the general rule and the other ones mentioned in the charge as follows: "This case suggests four theories as to the cause of the accident which is complained of under the declaration, and as many propositions of law applicable to them. How far there is sufficient evidence, or *any* evidence, to support any one of these theories I shall leave to you" (R. 28).

Fifth. In not defining the degree of care with which, according to the above qualifications, the defendant was chargeable.

Sixth. In granting the prayer of the plaintiff as to the measure of damages, as follows (R. 22–23):

"If the jury find for the plaintiff they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the personal inconvenience, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and if they find that the injuries sustained by the plaintiff are permanent they will also find for him such damages as will fully compensate him for the suffering of mind and body, the personal inconvenience, and the loss of time that he will

suffer in the future. In determining this as to the future they will consider plaintiff's bodily vigor and age as shown by the evidence adduced."

Seventh. In rendering a judgment for interest against the defendant and its surety notwithstanding the judgment of the circuit court bore no interest.

ARGUMENT.

I.

Contributory negligence, and under this head the first, second, third, fourth, and fifth assignments.

1. It was error to leave the question of contributory negligence to the jury. Whether there has been contributory negligence on the part of the plaintiff is a question for the jury under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. The rule, briefly, is that where the facts are undisputed and where but one reasonable inference can be drawn from them the question is one of law for the court; but where the facts are left by the evidence in dispute, or where fair minds might draw different conclusions from them, it must go to the jury to resolve the dispute in the one case or to draw the inferences in the other.

2 Thompson on Neg., p. 1175, s. 25; p. 1236, s. 11.
Randall *v.* B. & O. R.R., 109 U. S. 478, 482.
Railroad *v.* Jones, 95 U. S. 439.
District of Columbia *v.* McElligott, 117 U. S. 621.
State use of Dyrenforth *v.* B. & O. R.R., 73 Md. 376.

Whilst it is the duty of a street railroad company to provide safe and convenient means of entering and leav-

ing its cars, there is a corresponding obligation on the part of the passenger to exercise ordinary care and prudence, and if in this respect he is negligent and his negligence contributes to the injury of which he complains he cannot recover.

Thompson on Carriers of Passengers, 248, 257, 266.

As was said by this court in Jones *v.* Railroad, a case very similar to the present, "the liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter the former could not arise."

Apply the above familiar principles to the present case. The facts are not in dispute. They all emanate from the plaintiff, who is the only witness, and their absolute verity must be and is assumed.

Then what are those facts and what inference can be fairly drawn from them other than negligence on the part of the plaintiff? A man of sixty-four, encumbered by a cane in his right hand, voluntarily took his place on the step of a car in motion for the purpose of *waiting* until it stopped. Before placing himself in that position he saw that the step was occupied by two persons, who held the railings at each end, and that he could have no means of support. Seeing this, he deliberately stepped down between them and undertook the acrobatic feat of balancing himself without support until the slowing car should stop. There is no pretence that he was in any manner constrained to stand on the step. On the contrary, there were few passengers inside the car, and though there were a number on the platform there was room enough there for him. Indeed he passed through them to get to the step. Had he waited in the car or even on the platform, he could not have been injured, for no one was hurt except

himself, who stood without support upon the step. He had travelled daily in the car of the defendant for five years and it is to be presumed he knew what the step was for; that it was to enable passengers to get on and off the car and was not a place to ride on, especially when the support of neither railing could be had. His position on the step was wholly without authority. He was not put there or invited to go there.

Nor is there the slightest justification or excuse for his being there. He simply chose to occupy an exposed and unsafe place, and he swears he saw he could not get any means of support.

In most cases the question of contributory negligence is for the jury, but where, as here, the undisputed evidence discloses conduct which, judged in the light of common knowledge and experience, would be condemned as reckless by men of common prudence, it is the duty of the judge so to instruct the jury.

The rule to be applied is ordinary care and caution—that degree of care which men of ordinary prudence would exercise under the circumstances—and the judge, in a case like the present, is quite as capable of applying that rule to plain and undisputed facts as a jury.

While to ride upon the platform, or even upon the step with the support of the railing, may not be negligence in all cases, and much less negligence in law, it is submitted that to voluntarily ride upon the step of a moving car without any means of support is, in the absence of justification or excuse, necessarily negligence, according to any reasonable standard of care and prudence.

Wills *v.* Lynn & Boston R.R., 129 Mass. 351.

Jones *v.* R.R. *supra*.

Beach on Contributory Negligence, §§ 293, 294.

2. *The Negligence of the Plaintiff established, did it contribute to the injury?*

It cannot be doubted that a passenger voluntarily occupying an unsafe position in a car and injured by reason of such position is barred by contributory negligence from a recovery. In such a case the want of ordinary care is plainly a proximate cause of the injury. It is conceded that if the injury would have happened irrespective of the unsafe position, then such position would not be a proximate cause.

What, then, are the facts? Again, there is no dispute in relation to them, and they are established by the evidence of the plaintiff himself. They are, briefly, that there were six or eight passengers inside the car; that the platform was crowded; that there were on the step a man and a boy holding on to the railing at each end; that the plaintiff was also on the step, without any means of support. Thus when the sudden movement of the car took place the only person absolutely without any means of support was the plaintiff, and he, according to his own evidence, was the only person thrown off.

It seems necessarily to follow that he was thrown off in consequence of his unsafe position, and hence of the want of ordinary care and prudence. The sudden movement of the car was presumably slight, for the movement was not that of a car which had stopped and was started anew, but slight as it was it was sufficient to throw the plaintiff upon the street, as he says, and this effect shows how utterly insecure his position was and how reckless the voluntary assumption of that position. The facts of this case cannot, in principle, be distinguished from those in Jones *v.* Railroad, *supra*. There the plaintiff was in the wrong place, when in the exercise of ordinary care and prudence he

would not have been there, and was hurt through the negligence of the defendant. No one else was hurt except the plaintiff, and another who was with him, in the wrong place.

"He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was owing to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mental negligence we have laid down." (p. 443.)

It is submitted that the same approach to mathematical demonstration exists in the present case.

It is remarkable that the court below, with the above case before it, held in the present case (7 Mackey, 266) that the plaintiff, though voluntarily in an unsafe place, did not take the risk of any negligence on the part of the carrier. It is seriously argued that the plaintiff took the risk of *falling* but not of being *thrown off* by the negligence of the conductor. The argument is, in substance, that a passenger has the right to ride in any place and in any manner, and his negligence, however gross, is no bar to an action based upon the concurring negligence of the carrier, and that the only risk taken by the passenger is as to his own capacity for gymnastic exercises, or as to negligence from without.

The statement of the argument seems to answer it. It simply makes the carrier an insurer, and obliterates any sort of duty on the part of the passenger to co-operate in the work of transportation and delivery.

It will be observed that, in the present case, there was

no pretence of wilful injury. The declaration does not so charge (R. 12), nor was there a scintilla of evidence to that effect. The cause, or rather a cause, of the injury, upon the hypothesis of the plaintiff's evidence, was the supposition of the conductor that the plaintiff in descending to the step meant to use it for the only purpose for which it was intended—that is, to get off, and that after the allowance of a reasonable time for that purpose it was safe to proceed. In thus supposing the conductor rightly understood what the plaintiff swears was his intention, but, even if in acting upon this supposition the conductor was negligent, it surely cannot be said that he was wilfully or intentionally so.

3. *The Second Assignment.*

It is conceded that the burthen of proof as to contributory negligence is, as a rule, upon the defendant.

Railroad Co. *v.* Gladmore, 15 Wall. 501.

Railroad *v.* Herst, 93 U. S. 291.

Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 539.

The question is whether the rule is applicable to the present case.

The evidence was closed. The right to recover depended exclusively upon the evidence of the plaintiff, and his relation to the case was double—that of party and sole witness. He could enlighten the court and jury by evidence in the ordinary sense of that term, and he could also bind himself by solemn admissions made under oath in a judicial proceeding. He testified fully as to the facts, including his own conduct, and a recovery could be claimed only upon his evidence.

In a case so circumstanced it is submitted that the ordinary presumption of law in favor of care and prudence on the part of the plaintiff based upon the common instinct of self-preservation has no place.

The fact takes the place of the presumption. The case is not one where a presumption of law is to be removed by evidence, but where a party and witness, in the exercise of the legal right to waive a presumption of law in his own favor and to make judicial admissions, exercises that right and substitutes in lieu of the fact presumed by law to exist the fact as it really did exist.

In such a case there must be an end of the presumption of law, and the plaintiff must be judged without it and according to the truth as he swears it to be. And as it is only the presumption of law that relieves him from showing that he exercised due care and prudence, or, in other words, was without contributory negligence, the burthen of proof as to his own conduct is necessarily upon him.

1 Greenl., § 169, note (2), 171, 210, 14, 33.

4. *The Third, Fourth, and Fifth Assignments.*

These assignments involve the application of the exception to the general rule as to contributory negligence.

The question here is not as to the exception itself, but as to the circumstances under which it was applied by the court below and the manner of its application. Undoubtedly the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of the injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care and diligence for the purpose of avoiding injury to him.

Inland and Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, 558.

1 Shearman & Redfield on Neg., §§ 99, 100.

And it may be that the defendant need not actually know, but it is sufficient if, with ordinary care and diligence, he would have known the plaintiff's danger.

Id.

The essential element of the exception is the negligence of the defendant in failing to adapt his conduct to a condition of things caused by the negligence of the plaintiff.

To do this requires time and opportunity.

The exception does not abrogate the general rule as to contributory negligence, and the effort of courts has been, whilst giving effect to the exception, to preserve the general rule in its integrity.

It is apparent that if the elements of time and opportunity do not clearly exist, the application of the exception is simply to destroy the general rule and to substitute for it the rule of *comparative* negligence.

In Maryland there are two cases which very clearly draw the line between where the exception is and is not applicable. The first is Northern Central R.R. *v.* Price (29 Md. 420), where a person negligently walking on a railroad track was killed, and there was time and opportunity for the defendant to avoid the injury. The second is Northern Central R.R. *v.* Geis (31 Md. 357), where, under circumstances very similar to those of the present case, it was contended that the exception was applicable, as the negligence of the plaintiff was remote and that of the defendant proximate. Judge Alvey, delivering the opinion of the court in the latter case, draws the distinction between the two cases. He says: "It must appear that the de-

fendant might by a proper degree of caution have avoided the consequences of the injured party's neglect. * * This, however, implies *time* for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence. But where there is a concurrence of negligence of both in the production of injury to one of the parties, the causes are commingled and are regarded as equally proximate to the result produced, and therefore not susceptible of apportionment. And if it be true that the deceased was guilty of negligence, it must, from the nature of the accident, have been of this latter character" (p. 366).

This case was followed by Lewis *v.* B. & O. R.R. 38 Md. 588, 598, 599, 600, 601; Kean *v.* B. & O. R.R. Co. 61 Md. 154, 167, 168; and Maryland Central R.R. *v.* Neubeur, 62 Md. 391, 401, 402, in which the doctrine as laid down by Judge Alvey was discussed and affirmed.

The facts: The accident occurred at night; the bell was rung to let the plaintiff off when the car was about opposite the east side of 19th street west; the time that elapsed before the accident must have been less than a minute—the plaintiff says five seconds; the conductor had the right to presume that the plaintiff undertaking to get off a moving car had the physical capacity to do so, and further, that when he descended to the step he went there to alight from the car, as people are doing all the time, and not to "wait" there until the car stopped, as people never do unless reckless and foolhardy.

The ruling: The court told the jury, in substance, that if the plaintiff was negligent, or, as mildly put, "imprudent," in being on the step, yet the defendant was liable if the conductor failed to observe that the plaintiff was on the step and had not alighted, or seeing him there gave the signal that caused the sudden movement. Thus, in either

of the two contingencies mentioned, liability attached and the jury were at liberty to find either.

The evidence is all here and there is very little of it. It is denied that either contingency is in any degree supported by the facts in evidence or any inferences to be fairly drawn from those facts. As to the first, the conductor was authorized to assume after a reasonable time that the plaintiff, undertaking to alight before the car stopped, had done so, and had not waited midway on the step and in a place of danger. But it is not necessary to discuss the first contingency, as the jury were at liberty to find either, and it can never be known which they did find, and as the second is fatal to the ruling. The second is that the conductor *saw* the plaintiff on the step, and seeing him there caused the sudden movement that threw him off, and the jury were told that from the evidence they could find both facts embraced in this contingency: first, that the conductor *saw* the plaintiff, and, secondly, seeing him, was guilty of wilful and wanton misconduct in causing the movement of the car. Such a ruling made in case where the postulate of the ruling was negligence in law or in fact on the part of the plaintiff, and where it was for him to show clearly that though negligent himself his negligence could have been avoided by the defendant, cannot, it is submitted, be defended. The burthen was upon the plaintiff to bring himself within the exception—to a wholesome rule which could not be frittered away by insufficient evidence or the conjecture or speculation of the jury.

There was not only no scintilla of evidence to sustain the ruling, but the act imputed to the conductor, or which the jury were allowed to impute to him, is of such a character as to create every presumption against it.

It is error to instruct upon assumed facts of which there is no, or plainly insufficient, evidence.

U. S. *v.* Breitling, 20 How. 252, 254.
Michigan Bank *v.* Eldred, 9 Wall. 544, 553.
R.R. *v.* Houston, 95 U. S. 697, 702.
Jones *v.* Ven Benthuysen, 103 U. S. 87, 89.
Randall *v.* B. & O. R.R., *supra*.

As said by Mr. Justice Field in R.R. *v.* Houston, p. 703: "To instruct the jury upon assumed facts to which no evidence applied was error. Such instructions tended to mislead them by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration."

But more than this. The case was left to the jury in a manner that invited conjecture and speculation. It is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say from those facts, when submitted to them, whether negligence ought to be inferred.

Randall *v.* B. &. O. R.R., *supra*, and Metropolitan Railway Co. *v.* Jackson, 3 App. Cas. 193, 197, 198, etc., referred to in the opinion, p. 182.

The learned judge, instead of discharging this duty, turned it over to the jury. In his charge he says: "This case *suggests four theories* as to the cause of the accident which is complained of under the declaration and *as many propositions of law* applicable to them. How far there is *sufficient* or *any* evidence to support any *one* of these *theories* I leave to you."

It is submitted that a litigant is as much entitled to the

certain will inevitably and necessarily result from the injury.

Strohm *v.* N. Y., L. E. & W. R.R., 96 N. Y. 306.
Filer *v.* N. Y. Central R.R., 49 N. Y. 42, 45.
Curtis *v.* R.R. Co., 18 N. Y., 534, 542, 545.
Drew *v.* Sixth Av. R.R., 26 N. Y. 49, 52.

III.

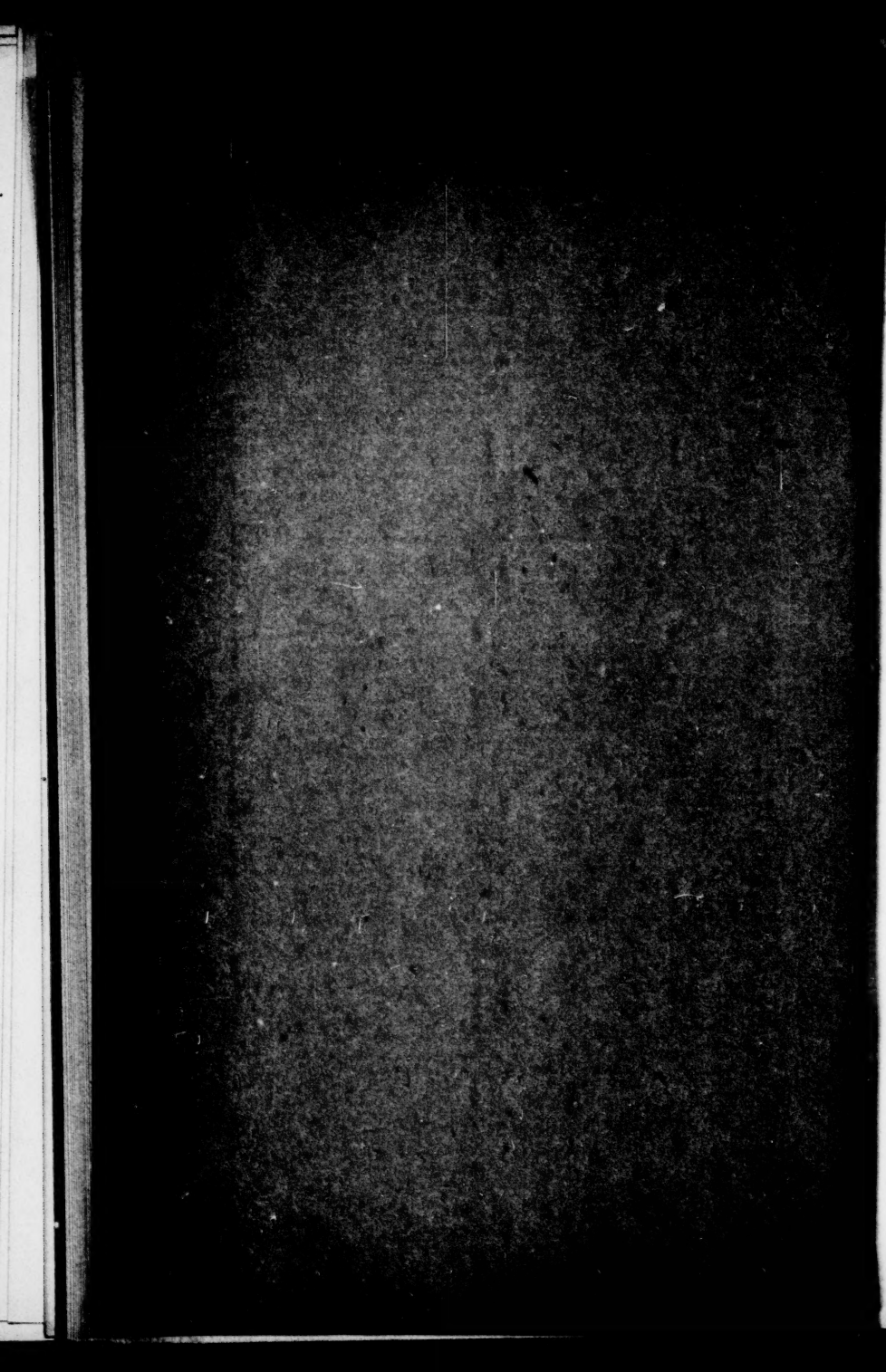
The Seventh Assignment—Interest.

The judgment of the circuit court bore no interest, and it was error in the court below to add it, from the date of that judgment, against the defendant and its surety. By the law of this District a judgment in an action of tort does not bear interest.

Keller *v.* Ashford, 133 U. S. 610, 618.
District *v.* Gannon, 130 U. S. 227.
R.R. Co. *v.* Trook, 100 U. S. 112.

The point was before this court in *In re* Washington & Georgetown R.R. Co. (140 U. S. 91), but not decided.

W. D. DAVIDGE.
ENOCH TOTTEN.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, AND HENRY HURT, PLAINTIFFS IN ERROR,

vs.

LEON TOBRINER, ADMINISTRATOR OF JOHN H. HARMON, DECEASED, DEFENDANT IN ERROR,

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No. 116.

WRIT OF ERROR
To the Supreme Court of the District of Columbia.

Brief for the Defendant in Error.

In the court below the defendant in error was plaintiff and the Washington and Georgetown Railroad Company was defendant. The action was brought by John H. Harmon in his lifetime to recover damages for

a personal injury to him by the negligence of the said corporation. The judgment of the General Term of the court below was against the other plaintiff in error because of his suretyship in the undertaking for appeal from the Special to the General Term.

The case was twice tried in the court below, the first time on the 8th of November, 1886, when there was a verdict and judgment in favor of the plaintiff for $3,000 (record, pages 4 and 5). Upon appeal to the General Term that judgment was reversed, and a new trial granted on July 11th, 1887 (record, p. 7). The second trial was had on the 1st day of December, 1889, and resulted in a verdict and judgment for the plaintiff for $6,500, (record, p. 8). This last mentioned judgment was affirmed by the General Term of the court below on the 12th day of June, 1889 (record, pp. 31 and 32). Whereupon the plaintiff in error sued out this writ of error (record, p. 33).

During the pendency of the second appeal in the General Term of the court below, the original plaintiff, Harmon, died, and the case was revived in the name of his administrator, the defendant in error.

The leading facts in the case are briefly stated in the opinion of the justice who delivered the opinion of the court below, as follows: "The plaintiff testified, in his own behalf that on the evening of the 28th of April, 1882, at about 9 o'clock, he took passage in one of the defendant's cars on Pennsylvania Avenue to go to his home on Nineteenth street; that he took his seat about two-thirds of the distance from the rear platform; that at or near Nineteenth street he signaled to the conductor to let him off; that the conductor was then inside the car figuring up his accounts under the light; that, upon receiving the signal, the conductor rang the bell and the car began to slow up, and, as he supposed, was

about stopping; that there were not many passengers inside, but the platform was crowded; that he made his way through the crowd on the platform and down on to the steps which was occupied by a man and a boy, who held on to the railing on each end of the step; that the car was at that time almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on the step the bell was rung and the car started, and he was thereby thrown off on to the pavement and injured. He further stated that the conductor did not go out to the platform to assist him to get off. On cross-examination he said that at the time of his attempting to get off, there were only six or eight passengers inside of the car, while the platform was so crowded that the man and boy referred to had to stand upon the step.

"On the part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars and of getting off while the car was in motion; that when the plaintiff signaled on the night in question he, the conductor, rang the bell and the car began to slow; that he was then standing on the rear platform; that he and a small boy were the only persons then on the platform; that the plaintiff, 'without waiting for the car to stop, after so signaling the conductor, immediately went out on the rear platform and stepped down upon the step, at the same time holding on to the iron railing on the car, and while the car was still in motion and moving at a slow rate or speed, nearly at a standstill, the plaintiff stepped off, and after he had let go of the car he, the conductor pulled the bell to go on again, and as the plaintiff turned, he fell; . . . that he did not ring the bell for the car to start until after the plaintiff had stepped on the street and let go of the car.'"

The conductor of the car also testified that the plaintiff

fell after reaching the ground as he turned to go up Nineteenth street ; that it was safe for the plaintiff to get off the car when he did and he fell after he got off. (See record, page 20.) The whole evidence is set out in the record on pages 12 to 21, both inclusive. During the trial defendant's counsel took exception to one ruling only as to the admissibility of evidence. After the evidence was completed, the court gave three instructions at the request of the plaintiff's attorneys, and two at the request of the defendant's attorneys, and gave in a modified form several others asked by the defendant's attorneys and rejected several asked by them. They all related to the question of negligence and contributory negligence. After arguments to the jury the court charged the jury generally upon the case. The defendant's counsel excepted to the granting of the instructions asked by the plaintiff, and to the refusal of the court to grant the instructions as prayed by them, and also to portions of the general charge. Upon this record the following questions arise :

1. Did the court err in admitting the evidence offered by plaintiff?

2. Was there error in the instructions of the court granted at the instance of the plaintiff?

3. Was there error in the action of the court in declining to grant the instructions prayed by the defendants' attorneys, or in modifying and granting some of them in a modified form?

4. Was there any error in the general charge of the court?

5. Was it error in the court in General Term upon affirming the judgment of the Special Term to enter its judgment against the surety in the undertaking on appeal?

First.

Admissibility of Evidence.

This question arose in this way. The plaintiff having testified to the manner of his injury, and that he fell upon his hip and hurt that severely, the conductor of the car, in testifying for the defendant, said that after the plaintiff fell, he stopped his car and went back to him, and that the plaintiff then told him that nothing was the matter with him, and that he had only twisted his ankle. After he had retired from the stand the plaintiff was recalled by his counsel for the purpose of contradicting that statement of the conductor, and to this counsel for the defendants objected. (Record, p. 20.) It will be seen that the only ground of objection alleged by counsel for defendant, is that this statement of the conductor was brought on cross-examination. A careful reading of the record shows that this was a mistake of the counsel. That that statement of the conductor was a part of his direct evidence. (See record, page 19.) Of course that would not have been a valid objection even had the fact been as counsel supposed. The evidence seems to be clearly admissible, but if there were any valid objection to it, as none was alleged by counsel at the time of the objection, it would not now be regarded by this court.

Camden *vs.* Doremus, 3 How., 530.
U. S. *vs.* McMaster, 4 Wall., 680.
Burton *vs.* Driggs, 20 Wall., 125.
Noonan *vs.* Caledonian Mining Co., 121 U. S., 393.

Again, it will be seen, by reference to the evidence of Geoffrey Jefferson (record, p. 21) that he gave evidence

substantially the same, unchallenged by the defense, which was a waiver of the objection to plaintiff's evidence even had it been well founded.

Gilbert *vs.* Plane Co., 19 U. S., 491.
Hinkley *vs.* Steel Co., 21 U. S., 265.
Chew *vs.* Beall, 13 Md., 348.
Union Bank *vs.* Planter's Bank, 9 Gill., 461.

Second.

Instructions Granted at the Instance of Plaintiff's Attorneys.

There were three of these ; (see record, pp. 21, 22, and 23). The first is to the effect that if the plaintiff was thrown from the car by the negligence of the defendant's employees, without negligence on his part, he was entitled to recover ; the second, that it was a question for the jury whether the standing by the plaintiff on the step of the car, while waiting for it to stop, was contributory negligence on his part under all the circumstances of the case ; and the third states correctly the measure of damages in such cases. Each of these instructions states an elementary principle so familiar as to need no further consideration.

Third.

Instructions Prayed for by Defendant's Counsel, and Refused by the Court.

It will be seen (record, p. 28) that the court gave two instructions at the instance of plaintiff 's counsel in the exact language they were asked, and they seem to cover the whole case.

The defendant's rejected and modified prayers, when analyzed, requested the court to affirm only the following points:

1. That the burden of disproving contributory negligence was on the plaintiff;

2. That if the plaintiff got off the car while it was in motion, that was negligence *per se*, and would prevent a recovery;

3. That it was a question for the jury, if they believed he got off the car while in motion, to say whether under the circumstances it was negligence for him to do so, and if they believed so, he could not recover;

4. That there was evidence from which it would be competent for the jury to find that the plaintiff was injured by stepping off the car while it was in motion.

The negative of the first proposition is established by so many decisions of this court that no further comment is necessary.

It is also settled by the decisions of this court, that the question of contributory negligence under such circumstances as the evidence shows in this case, is one of fact to be left to the jury.

R. R. Co. *vs.* Varnell, 98 U. S., 479.
Kane *vs.* R. R. Co., 128 U. S., 91.
Jones *vs.* R. R. Co., 128 U. S., 443.

The third proposition is defective in not requiring the jury, if they believed negligence existed on the part of the plaintiff, to further find that it contributed to the injury in order to justify a verdict for the defendant. The court added this modification, and granted the prayers of the defendant presenting that aspect of the case. (See record, pp. 24, 25, and 27.)

As to the fourth proposition, there is absolutely no evidence tending to show that the plaintiff was injured

in getting off the car while it was in motion. The plaintiff and the conductor of the car are the only witnesses who attempt to tell how the plaintiff got off the car, or how he was injured. The plaintiff denies that he stepped off while the car was in motion, or that he stepped off at all. He says he was thrown off by the sudden starting of the car while he was waiting and expecting it to come to a standstill. The conductor says that it was safe for the plaintiff to get off when he did ; that he was not thrown down in stepping off when the car was in motion ; that he reached the ground in safety, and fell as he turned and took the first step. (See evidence of the conductor, record, p. 20.) But notwithstanding this was the state of the evidence, the court in its general charge, permitted the jury to consider the case as if there had been evidence tending to show that the plaintiff was injured in getting off the car while it was in motion. See record, page 29, where the court expressly submits that view of the case to the jury. This was more favorable to defendant than the evidence justified.

There is no shadow of error in the rulings of the Justice presiding at the trial, as is conclusively shown by the very lucid opinion of Mr. Justice James, who delivered the opinion of the court below, and which is printed as an appendix to this brief. The same will also be found reported in the 18th District of Columbia reports, page 255.

Fifth.

The Court did not err in Entering Judgment against the Surety in the Undertaking for Appeal from the Special to the General Term of the Court below.

The act of Congress of March 3d, 1863 (see Revised Statutes of the U. S. relating to the District of Colum-

bia, section 770, creating and conferring jurisdiction upon the court below) provides: "the Supreme Court in General Term shall adopt such rules as they may think proper to regulate the time and manner of making appeals from the Special Term to the General Term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules."

By authority of this statute the court below, on April 5th, 1886, formulated a revision of these rules. Rule 89, after providing that the General Term will not hear appeals taken more than 20 days after the judgment complained of, further provides, "No such appeal shall operate, except where the District of Columbia is appellant, as a stay or supersedeas of execution, unless the same be taken and perfected within ten days, Sundays excluded, after the day of the date of the judgment, order, or decree appealed from, in the manner following, viz., where the judgment is for a specific sum of money, the appellant with one surety or more, to be approved by the court, or one of the justices, shall within the ten days aforesaid, execute and file in the cause an undertaking in the following form substantially:

"IN THE

"SUPREME COURT OF THE DISTRICT OF COLUMBIA.

"*The ——— day of ———, 18—.*

A. B., PLAINTIFF,
vs.
C. D., DEFENDANT. } At Law, No. ——.

"The defendant (*plaintiff*) having appealed to the General Term from the judgment (*decree*) pronounced again

him by the Circuit Court (in the special term) on the day of , 18 , and , his surety, for themselves and each of them, their and each of their heirs, executors and administrators, appearing and submitting to the jurisdiction of the said General Term, hereby undertake to abide by, perform and pay its judgment (decree) which they agree may be pronounced against all of them." (See rules of practice, Supreme Court of the District of Columbia, pages 33 and 34.)

The defendant, and its surety, Mr. Hurt, entered into an undertaking upon this appeal in the form prescribed by said rule. (See record, p. 11.)

The statute above quoted, gave the court below special power to adopt such rules as the one in question, and when adopted, they had the same force as if enacted by act of Congress.

Bank *vs.* Okely, 4 Wheat., 242.
Mills *vs.* Bank, U. S., 11 Wheat., 439.
Hiriart *vs.* Ballon, 9 Peters, 156.
U. S. *vs.* Mundell, 1 Hughes' Circuit Court Reports.
Seymour *vs.* Phillips, 7 Biss., 460.
Wall *vs.* Wall, 2 Harris & Gill., 79.
Thompson *vs.* Hatch, 3 Pick., 312.

In the case last cited, Parker, Chief Justice, speaking of a similar rule of court says: "But a rule of the court thus authorized and made, has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case."

This question was decided by this court at the October Term, 1889, in the case of the Inland and Seaboard Coasting Company *vs.* Tolson, No. 532 on the calendar of that term, though no written opinion of the court

was ever delivered. That case was a writ of error to the Supreme Court of the District of Columbia in a case in which judgment had been entered under the rule, and on a like stipulation, against the Inland and Seaboard Coasting Company, who was the principal below, and its sureties in the undertaking. In suing out the writ of error the Inland and Seaboard Coasting Company only was made plaintiff in error. The defendant in error made a motion to dismiss, upon the ground that the judgment being joint, all the parties against whom it was, must join in the writ of error. In reply to this motion the counsel for the plaintiff in error argued that the judgment against the sureties was void for want of jurisdiction of the court to pronounce it. But this court held that it was a valid joint judgment and that all the defendants must join in a writ of error, or have a summons aud severance, and as neither had been done, the writ was dismissed. It is true that at a subsequent day in the same term, on motion of the plaintiff in error, that judgment was set aside, and the writ of error was allowed to be amended by making all the defendants in the judgment, plaintiffs in the writ.

This record is so clear of any error that it must be apparent that the writ of error in this case was sued out merely for delay; and it is respectfully submitted that it is a proper case for the application of the rule of this court in relation to damages in such cases.

W. A. COOK.
W. L. COLE.
C. C. COLE.

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

In General Term.

JOHN H. HARMON

vs.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

At Law.
No. 24,010.

Decided June 12, 1889.

Justices Hagner, James and Montgomery sitting.

Mr. Justice James delivered the opinion of the court:

This is an action for injuries sustained by reason of the defendant's negligence in causing the plaintiff to fall from one of its cars. The plaintiff testified, in his own behalf, that on the evening of the 28th of April, 1882, at about nine o'clock, he took passage in one of the defendant's cars on Pennsylvania avenue to go to his home on 19th street; that he took his seat about two-thirds of the distance from the rear platform; that at or near 19th street he signalled to the conductor to let him off; that the conductor was then inside the car figuring up his accounts under the light; that, upon receiving the signal, the conductor rang the bell and the car began to slow,

and, as he supposed, was about stopping; that there were not many passengers inside, but the platform was crowded; that he made his way through the crowd on the platform and down on to the step, which was occupied by a man and a boy, who held on to the railings on each end of the step; that the car was, at that time, almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on to the step the bell was rung and the car started, and he was thereby thrown off on to the pavement and injured. He further stated that the conductor did not go out to the platform to assist him to get off. On cross-examination he said that, at the time of his attempting to get off, there were only six or eight passengers inside of the car, while the platform was so crowded that the man and boy referred to had to stand upon the step.

On the part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars and of getting off while the car was in motion; that when the plaintiff signalled on the night in question he, the conductor, rang the bell and the car began to slow; that he was then standing on the rear platform; that he and a small boy were the only persons then on the platform; that the plaintiff, "without waiting for "the car to stop, after so signalling the conductor, immediately went out on the rear platform and stepped down upon the step, at the same time holding on to the iron railing on the car, and while the car was still in motion, and moving at a slow rate of speed, nearly at a standstill, the plaintiff stepped off, and after he had let go of the car he, the conductor, pulled the bell to go on again, and as the plaintiff turned he fell; . . . that he did not ring the bell for the car to start until after the plaintiff had stepped on the street and let go of the car."

All of the testimony in the case is set out in the

record, but enough has been stated to show the bearing of the exceptions taken by the defendant, the appellant. At the close of the testimony the plaintiff asked the following instruction, which was given: "If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and that while the plaintiff was waiting for the car to stop, and before it had fully stopped, the car started suddenly forward through the negligent act of the conductor or driver, and that the plaintiff was thereby, and without any negligence on his part, thrown from the car and injured, then he is entitled to recover."

To this instruction the defendant excepts on the ground that it commits the subject of negligence to the jury in general terms, without any rule to guide them. It appears to be the effect that, if the jury should find that the sudden starting of the car, while the plaintiff was waiting to get off, was negligence, and that the plaintiff was thereby thrown off and injured, and that the plaintiff had not done any negligent act, then they should find for the plaintiff. As to the negligence of the defendant, a definite problem was submitted to the jury. They were to determine whether the injury was caused by a certain act of the defendant, and whether that act was negligence; and that was a question which a jury is competent to decide without further guidance. In one respect the instruction as to the plaintiff's negligence was erroneous; but the error was against the party asking it. The jury were allowed to consider whether the injury was "without *any* negligence on his part," and to deny him a verdict if there was *any* such negligence, whether contributory or not. Of this improper limitation of the plaintiff's right, however, it is not for the defendant to complain.

On the part of the defendant the following instruction was asked and refused: "The burden of proof is upon the plaintiff to satisfy the jury that he sustained the injury which is the subject of this action, by reason of the negligence of the defendant and without contributory negligence on his part." In support of his exception to the court's refusal to give this instruction the defendant cited The Indianapolis R. R. *vs.* Hurst, 93 U. S., 298. In that case the Circuit Court had charged the jury that "the burden of proving contributory negligence rests on the defendant; and it will not avail the defendant, unless it has been established by a preponderance of the evidence." The Supreme Court held that this was correct, and added the following comment: "The court did not say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence coming exclusively from the party on whom rested the burden of proof. It is not improbable that the charge was given by the court from an apprehension that the jury might without it be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof or insufficient proof on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in any wise neutralizing the effect of the testimony the plaintiff had given, if there was any, bearing on the point adversely to him." This court has repeatedly applied this rule. It rests upon the very simple principle that no person is *presumed* to have done wrong or to have been in fault. He must be shown to have been so. The same principle which requires proof against the defendant requires

proof against the plaintiff, and negligence on the part of the plaintiff is purely a defensive proposition and *a part of the defendant's case.* If evidence tending to establish that proposition comes out in the plaintiff's proof of the circumstances of the injury, it is of course available to the defendant; but it is treated in that case precisely as it would be treated if that evidence had been produced by him. It may be said to be weighed by the jury as his evidence, and the burden is on him that there shall be a preponderance of evidence against the plaintiff on the question of contributory negligence. The question is not whether the plaintiff has acquitted himself of negligence, but whether the defendant, by adopting what comes from the plaintiff's witnesses and by what he produced himself, has a preponderance of evidence to the effect that the plaintiff had contributed to his injury by his own negligence. But it is not worth while to dwell upon the grounds of this rule; the question has been absolutely settled and closed by superior authority.

The defendant next complains that the court refused the following instruction: "There is evidence in this cause from which the jury may infer contributory negligence on the part of the plaintiff, and if the jury find the same, the plaintiff is not entitled to recover." We think it would not have been proper to treat that question in that way. Such an instruction would contain the very vice which the exceptant imputes to the first instruction given at the instance of the plaintiff. It leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory. It points out nothing for their consideration, and could only have effect as an indefinite and misleading intimation that there was evidence of

contributory negligence. On the other hand, the court covered the same ground in its charge to the jury. The trial justice there said: "If the plaintiff undertook after requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving necessarily some imprudence; so I take it; and if that act was the cause of his *falling*, it would amount in my judgment to contributory negligence, and would defeat his action." This part of the charge gave the defendant more than he asked in his rejected prayer. If this instruction, however, had not been given in the charge, the prayer would still have been properly refused. It was substantially wrong and was also misleading as a detached proposition.

The next exception argued by the defendant is, that the court erred in refusing to rule that the plaintiff *in law* contributed to the injury. The facts on which such an instruction must rest were themselves in dispute. The court could so instruct only upon an undisputed basis.

The remaining exceptions are to the charge. The court began by stating that the case suggested four theories as to the cause of the accident complained of, and then stated these theories as follows:

1. "In the first place the testimony on the part of the defendant is to the effect that the plaintiff *had descended from the car in safety*, and that he stepped and fell from some cause not attributable to the conduct of the defendant, but from some unforeseen accident. If you find that to be the case, it is perfectly apparent that there is no ground of action at all.

2. "If the plaintiff undertook, after requesting the conductor to stop the car, *to descend from the car while it was still in motion*, however slowly it might be going;

that is an act involving necessarily some imprudence; so I take it; *and if that act was the cause* of his *falling*, it would amount, in my judgment, to contributory negligence, and would defeat his action.

3d. "If you were satisfied that it was an act of carelessness on his part to come out on the crowded platform *and step down on the step while it was already occupied by other people, so that he had to stand between them, and had no means of supporting himself, and in consequence of that alone, he fell from the car, without any other cause* —I say, if you are satisfied that that was an act of carelessness on his part, and that it was the direct cause of his *falling* from the car, that would also amount to contributory negligence, which would defeat his right to recover."

4th. "If you are satisfied that while he was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety and no accident would have happened, but that, instead of so doing, the conductor, *either negligently failed to observe whether or not he had alighted*, or *seeing him* there, neglected to await until he had alighted, and gave the signal to go on, *and in consequence of that a sudden jerk of the car took place, and that threw him down and was the immediate cause of his falling*, and that the accident would not have happened but for that fact, then I hold that the company is responsible."

To so much of the charge as was stated under the first, third, and fourth of these theories or conditions of the evidence, the defendant excepted.

We do not perceive any ground for his exception to the first theory. It was wholly in his favor. His exception to the third seems to be taken on the ground that the hypothesis contained in it showed contributory

negligence in law, and that therefore the question of contributory negligence should not have been left to the jury at all. We are of opinion that this hypothesis involved questions of fact which the court had no right to decide, and that the whole question of negligence, and of the actual cause of the accident, was properly and necessarily left to the jury.

At the argument, however, the defendant's most serious objection was to the charge of the court upon the fourth hypothesis or theory of the evidence. For the sake of clearness, we repeat this part of the charge: "If you are satisfied that while he (the plaintiff) was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety, and no accident would have happened, but that, instead of so doing, the conductor *either negligently failed* to *observe* whether or not he had alighted, or seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and, in consequence of that a sudden jerk of the car took place, and that that threw him down and was the immediate cause of his falling, and that the accident would not have happened but for that fact, then I hold the company is responsible."

This presents for consideration the doctrine of proximate or effective cause in cases of injury.

In any such case the facts may show that the plaintiff simply hurt himself, or that he helped to hurt himself, while the defendant also hurt him; or they may show that, although the plaintiff had been guilty of some negligence, he cannot be said to have thereby hurt himself or to have helped to hurt himself, and that it was really the defendant who caused the injury. In the

first and second conditions of fact the plaintiff cannot recover; in the last, he can.

By the instruction just recited the court undertook to give the jury a rule for determining whether the plaintiff should be held by them to have helped to hurt himself or whether, in spite of his antecedent imprudence in being on the step, the real *cause* of his being hurt was the act of the defendant. Was this rule correctly given? In order to determine the effect of an instruction it is sometimes convenient to recast it.

The jury were substantially told that, even if they should think it was imprudent in the plaintiff to step down onto the step before the car had stopped, yet if they were satisfied that no harm would have come of his doing so if the conductor had allowed the car to stop, and were satisfied that, instead of allowing it to stop, the conductor gave a signal to go on, and that in consequence of that a sudden jerk caused the plaintiff to fall off the step, and that in giving this signal and thus causing the jerk the conductor was negligent, either *by reason of failing to observe*, before he gave it, whether or not the plaintiff had alighted or by reason of failing to wait till the plaintiff had alighted after seeing that he had not done so—then they should find that the defendant's negligence was *the cause* of the injury.

The defendant's printed argument says of this instruction: "The court erred in ruling that if the jury found that the plaintiff was, in fact, *guilty of contributory negligence* in descending to the steps under the circumstances he could still recover if the conductor either negligently failed to see him there or saw him there and then started the car and thereby threw him off." And he thereupon argued that the authorities allow a recovery by one who has himself been negligent in those cases only where the defendant had actually discovered the

plaintiff's resulting danger and had time, after so discovering it, to counteract it and failed to use his opportunity.

As to this mode of stating the court's ruling it is to be observed first that it misconstrues the instruction. The jury were *not* told that, even if the plaintiff "was, in fact guilty of contributory negligence," he might still recover on the conditions supposed. On the contrary, they were plainly made to understand that they were first to determine whether the plaintiff's negligence was *contributory;* and they were further told, in effect, that it was not to be treated as contributory if they found that it was after all the defendant's negligence which rendered fatal what would otherwise have been harmless. And then, for the purpose of applying this test of the true cause of the injury, the jury were authorized by the instruction to treat *a failure to observe* whether a passenger, about to alight, was safely off the car before it was started again as a negligence, which was the proximate cause; in other words, *the cause* of the injury.

It is proper, however, to consider the aspects of the case as presented by the defendant. It was insisted at the argument that by placing himself upon the step of the car, the plaintiff was guilty of a negligence which exposed him to the injury which befell him, and that such negligence must be considered to be a contributory cause of that injury, unless it is shown that the defendant *became aware of plaintiff's danger*, and was by such knowledge charged with a duty to avert its consequences, and that he neglected that duty. It was admitted that in such a case the negligence of the defendant in not counteracting a peril which he saw, would be the proximate cause, and therefore, in law the cause of the injury; but it was claimed that where the defendant was only negligent in not seeing that the plaintiff was in

danger the case was simply one of two similar and co-operative negligences, and that the defendant's negligence could not then be treated as the cause of the injury. In support of this proposition the defendant referred to cases in which the injury happened when the plaintiff and defendant were using some highway, and it was claimed that the principle established by those authorities is that when the plaintiff has been guilty of negligence, the defendant cannot be held liable, unless it is shown that he had actual knowledge of the plaintiff's condition of peril and was *then* negligent of his duty to try to avoid the injury.

It is unnecessary to consider in this case whether, in the class of cases referred to, a defendant's *negligent ommission to observe* that he had the opportunity to render the plaintiff's prior negligence harmless should have the same effect to charge him, as the proximate cause of the injury, which his omission of duty in that respect, after actually seeing that he had that opportunity, is admitted to have. The question which we have to determine is, what is the effect of a passenger-carrier's *omission to observe* whether a passenger, whom he is setting down, has actually alighted; and this question is governed by the law of this particular business.

It is to be remembered that, by the hypothesis of the instruction now under consideration, the matter in hand was *the delivery* of a passenger; that the car had slowed in order that he might alight; that the passenger was on the platform step for the purpose of alighting, and that his carrier, without observing whether the delivery was completed, started the car again, with a sudden jerk, and threw him off.

Now, the omission in such a case was not, as in the cases referred to, an omission to observe that a person had placed himself in danger of being hurt by him,

whereby he himself was called upon to exercise care to avert that consequence; it was not as merely a dangerous position, that the fact of his passenger's being still on the platform step was to be observed by him, but, as a fact, involving the question whether his passenger's delivery had yet been completed by his alighting. It was part of his own employment to observe whether an alighting passenger had actually alighted before he should start his car again. The legal aspect of *his* omission was that it was a failure to observe whether he had completed his own work of delivering his passenger; and if he did not attend to that duty, and did not give his passenger time enough to get off before he started again, it was necessarily this negligence of a common carrier's duty that did the mischief. The duty spoken of in the authorities referred to by the defendant stands upon a wholly different principle. In those cases the duty was one owing to a person solely because he was in danger of being hurt; in this case the duty was owed to one whom the defendant had undertaken to deliver, and who was to be allowed by the defendant to alight without any interruption of his alighting.

But, as the plaintiff's "imprudence" in being on the platform step was dwelt upon by the defendant as an act of negligence, and was adverted to in the court's instruction it is proper to consider further the legal aspect of that act, and especially whether it could possibly be regarded as a negligence, *contributory to his being jerked off by the starting again of the car.*

It is an essential element of all the cases in which the plaintiff has been held guilty of contributory negligence by being in the wrong place that he thereby put himself in the way of precisely what happened to him, and his doing so was negligence just because he disregarded that risk. For example, when a person walks upon a

railway track his doing so is held to be negligence because he incurred the risk of the very injury that befell him. It is irrelevant to consider whether he thereby exposed himself to some other kind of mishap. Negligent exposure of that kind could not be contributory to the mishap that did occur; and so here. It is irrelevant to the defendant's exception that the plaintiff may, by going onto the platform step before the car stopped, have put himself at the risk of *falling* off by reason of some motion of the car, since that could not be contributory to his being jerked off by the conductor's starting again. The question is whether he exposed himself to this last peril and thereby contributed to the injury which actually happened. Now, the hypothesis of the charge is that the plaintiff, being a passenger carried by a common carrier of passengers, had demanded a stoppage of the car in order that he might alight. He had a legal right that the car should not merely slow, but actually stop for that purpose, and there was, *in contemplation of law*, no risk that it would start again, either with sudden jerk or otherwise, until he should have alighted. Nothing was to be anticipated by him but a complete performance of the carrier's duty. It was on his part a matter of course, because it was a part of the law of passenger carrying that no sudden starting should interrupt the course of his alighting. Even if it be true that he put himself in peril of falling before the car came to a standstill he cannot be said to have put himself in peril of being in this way jerked off and thus to have contributed to his being jerked off by the conductor. On the other hand it does not lie in the mouth of the carrier to object that the passenger made it easy for him to be jerked off by a starting of the car, which constituted a violation of the carrier's duty to that passenger.

On the hypothesis of the charge, then, no case of two *contributory* negligences can arise. The negligence of the conductor in failing to observe whether his passenger had alighted before he caused the car to start again, thereby throwing him off, would necessarily be *the cause* of the injury.

In conclusion, we deem it important to state again the duty of this class of carriers. It is the legal duty of the conductor of a street car to *stop* his car when a passenger is about to alight; it is his legal duty to observe a passenger who is alighting and to be sure that he has actually alighted, before he starts his car again; and if he hurts his passenger by any neglect of his duty, it is immaterial whether that neglect consisted of not observing what it was his particular business to observe, or of not doing what it was his particular business to do after he had observed.

We find no error in the rulings of the court, and we find in the case stated no reason to question the verdict of the jury. Judgment is, therefore, affirmed.

IN THE

Supreme Court of the District of Columbia.

COPY OF RULE 89.

Promulgated April Fifth, 1886.

APPEAL TO GENERAL TERM.

"89. Upon an appeal to the General Term the court "shall review the order, judgment, or decree appealed "from, and affirm, reverse, or modify the same, as shall "be just.

"No order, judgment, or decree of any of the courts "held by a single justice shall be reviewed in the General "Term, unless the appeal be taken and perfected within "twenty days, Sundays excluded, after the order, judg- "ment, or decree complained of shall have been made "or pronounced; and no appeal shall be considered as "taken and perfected unless taken in open court and "entered on the minutes, or entered in writing in the "clerk's office, and an appeal bond or undertaking be "given and approved by the court or a justice thereof "which shall be sufficient, at least, to cover the cost of "the appeal.

"No such appeal shall operate, except in cases where "the District of Columbia is appellant, as a stay of super- "sedeas of execution, unless the same be taken and "perfected within ten days, Sundays excluded, after the "day of the date of the judgment, order or decree ap- "pealed from, in the manner following, viz: where the "judgment is for a specific sum of money, the appel- "lant, with one surety or more, to be approved by the "court or one of the justices, shall, within the ten days "aforesaid, execute and file in the cause an undertaking "in the following form substantially:

"IN THE

"SUPREME COURT OF THE DISTRICT OF COLUMBIA,

"*The——day of——*, *18—*.

"A. B., PLAINTIFF, *vs.* "C. D., DEFENDANT. } At Law, No.——.

"The defendant, (*plaintiff*) having appealed to the "General Term from the judgment (*decree*) pronounced "against him by the Circuit Court (in the special term) "on the day of , 18 , and " , his surety, for themselves and each of them, "their and each of their heirs, executors, and admin- "istrators, appearing and submitting to the jurisdiction "of the said General Term, hereby undertake to abide "by, perform, and pay its judgment (*decree*) which they "agree may be pronounced against all of them.

"And where the judgment, order, or decree is not for "a specific sum of money, any justice of the court may "determine, by order to be entered on the minutes of "the court, the amount and character of the security to

"be given, which shall be sufficient to secure the satisfac-
"tion of the judgment, order, or decree appealed from.
"The court may, upon cause shown and notice, enlarge
"the time for filing the undertaking or other security
"required."

Amendment Adopted July 2, 1888.

"ORDERED, That rule 89 be amended by striking
"out from the second paragraph thereof the words '*and*
"*an appeal bond or undertaking be given and approved*
"*by the court, or a justice thereof, at least to cover the*
"*costs of the appeal.*'"

DISTRICT OF COLUMBIA, *ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify that the foregoing is a true copy of Rule 89 of the Rules of Practice of the Supreme Court of the District of Columbia, as promulgated April 5, 1886, together with an amendment to said Rule adopted July 2, 1888.

In testimony whereof I hereunto subscribe my hand and affix the seal of said court, at the city of Washington, this 3d day of January, A. D. 1893.

J. R. YOUNG,
Clerk.

[SEAL.]

147 US 571

JAN 18 1893
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 116.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND HENRY HURT, PLAINTIFFS IN ERROR,

vs.

LEON TOBRINER, ADMINISTRATOR OF JOHN H. HARMON, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Harmon, aged 64, not shown to be feeble, took passage on one of defendant's cars, defendant being a carrier of passengers for hire, on a street railway drawn by horses. Having arrived at the place he desired to get off, he, seated in the car, gave notice to the conductor, also in the car, engaged in figuring up his trip accounts, to stop the car. The conductor responded by signalling the driver to stop the car. The driver responded, and the car began to slow down, and

plaintiff rose from his seat, went out upon the platform, which he found crowded with passengers. He pushed through these, and just as the car was almost upon an absolute stand-still he stepped upon the step of the platform between a man and a boy thereon. At the instant of going upon the step of the platform the driver was signalled to go forward. He responded, and the car was started with a sudden jerk that threw plaintiff off and injured him seriously and permanently.

Two trials by jury. In each the defendant introduced evidence (that of the car conductor) tending to prove that plaintiff alighted safely from the car and then fell and was hurt. The first verdict was in plaintiff's favor, but the judgment thereon was reversed for error of law occurring upon the trial.

The second verdict was also in plaintiff's favor, upon which judgment was rendered. This was affirmed by the general term, and the case is now here on writ of error from this judgment of affirmance.

There were but two questions in the case:

(*a.*) Was it negligence on the part of plaintiff to go upon the step of the platform as he did?

(*b.*) If it was, could the defendant by the exercise of care have prevented the car being started suddenly with a jerk that threw plaintiff off?

The defendant having introduced contradictory evidence with a view of proving that plaintiff was hurt after getting off the car safely, the case had to go to the jury.

As fair minds might differ as to whether the plaintiff's going upon the step of the platform under the circumstances was *contributory* or any kind of negligence, it was impossible

for the trial justice to instruct the jury, that as a matter of law it was such contributory negligence that plaintiff could not recover.

For, first, there was the duty of the defendant to have a clear platform and step thereto, the means provided for passengers' ingress and egress to the car; then there was the sudden starting forward of the car with a jerk that, with the exercise of the utmost caution, extraordinary vigilance, aided by the highest skill by the defendant's employees, could have been avoided.

The case was not one of either riding upon the platform of a car whilst in motion or getting off a car whilst in motion.

The plaintiff exercised the right he had to have the car stopped. The defendant's employees responded to his request therefor, and he went upon the step at almost the very instant of the car coming to a stand-still, with the view of stepping off when the car should have done so.

The rule laid down by this Court, from Stokes *vs.* Saltonstall, 13 Peters, 181, down, is that a carrier of passengers for hire is bound to observe the utmost caution, and is responsible for the injuries received by them in the course of their transportation by the want of extraordinary vigilance, aided by the highest skill,

Pennsylvania Co. *vs.* Roy, 102 U. S., 451.
The New World *vs.* King, 16 How., 469.

Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury. Where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion,

would be compelled to set aside a verdict in opposition to it, the trial justice may withdraw the case from the jury and direct a verdict.

Delaware, &c., Co. *vs.* Converse, 139 U. S., 472.

Nothing of the sort was attempted in this case. The question of negligence was most fairly left to the jury. No defendant had ever less cause to complain on this point, and this Court will not review.

Delaware Co. *vs.* Converse, *supra.*

Railroad Co. *vs.* Varnell, 98 U. S., 479, is directly in point, and the opinion of the general term upon the case cannot be improved upon.

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The following is from a brief submitted below and is submitted as an addendum may be useful.

But it may be contended that a claim that the evidence was not sufficient in law to warrant the verdict was one of the grounds of the company's motion for a new trial, which overruled, makes the question one for consideration on this appeal.

Should the court so regard the matter, we ask consideration of what follows:

We can conceive of but one proposition upon which it can be contended that the evidence was not sufficient. It is this: That Harmon by going upon the step of the platform under the circumstances detailed in the evidence was negligent, and that it exonerated the company from liability for the injury, no matter what caused the starting forward of the car that threw him off, and though the servants of the company, the conductor and driver, could by the exercise of the utmost care, skill, and caution on the occasion, have prevented the starting forward of the car and Harmon being thrown off thereby.

Such is not the law as laid down by numerous decisions of the United States Supreme Court beginning with Stokes *vs.* Saltonstall, 13 Pet., 181, and thence to the present time.

The question presented—the equivalent to a demurrer to evidence—stands upon an admission that Harmon's evidence was absolutely true, and gave him the benefit of anything in the testimony of the company's witness that was favorable to him.

McEldery *vs.* Flanagan, 1 H. & G., 320.
Lake Shore, &c., R'y Co. *vs.* Foster, 104 Ind., 293.

As to Harmon's alleged negligence—

In the first place, riding upon platforms of street cars is not *per se* contributory negligence.

West Philadelphia, &c., *vs.* Gallagher, 108 Penn. St., 524.
Germantown, &c., *vs.* Walling, 97 Penn. St., 55.
Nolan *vs.* Brooklyn, 87 N. Y., 63.
Meesel *vs.* Lynn, &c, R'y, 8 Allen, 234.
Maguire *vs.* Middlesex R'y, 115 Mass., 239.

It is not even negligence *per se* to get off or attempt to get off a steam railroad car whilst in motion. It is dependent upon the circumstances.

Cumberland Valley R'y *vs.* Maugans, 61 Md.
Doss *vs.* Missouri &c., R'y, 59 Mo., 27.
Illinois, &c., R'y, *vs.* Able, 59 Ill, 131.
Kentucky, &c., R'y *vs.* Dills, 4 Bush, 593.

It would necessarily be much less so in the case of a horse street-car. *Ib.*

Where a person on a street-car told the driver the place where he desired to get off and was notified by the driver that they had reached that place, and, when he was in the act of stepping off, the car started up with a sudden jerk which threw him upon the ground, inflicting serious injury, it was held that this was a clear act of negligence on the part of the company.

Chicago City R'y *vs.* Mumford, 97 Ill., 560.
Nichols *vs.* Sixth Avenue R'y, 38 N. Y., (11 Tiffany,) 131.
Flock *vs.* Union R'y, 134 Mass., 480.
Varnell *vs.* Railroad, 98 U. S.

The conductor testified that, the speed of the car considered, it was safe for Harmon, and he did get off safely.

If the servants of the company, the conductor and driver, could, by the exercise of the utmost care, skill, and caution on the occasion, have prevented the sudden starting forward of the car with the jerk that threw Harmon off, that established the responsible negligence of the company. That is the law as enunciated by the State courts we have cited, and it is the law as declared by the United States Supreme Court.

In Transportation Co. *vs.* Downer, 11 Wall., 134, it was said: "There must be reasonable evidence of negligence (on part of defendant;) but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." (Cited Scott *vs.* London, &c., Dock Co., 3 Hurlstone & Coltman, 596.)

Nitroglycerine Case, 15 Wall., 538.
Indianapolis, &c., R'y *vs.* Horst, 93 U. S., 297.
Railroad Co. *vs.* Lockwood, 17 Wall., 382.
Steamboat Co. *vs.* Brockett, 121 U. S., 637.

For the reason for the rule, see cases already cited, (13 Pet., 181; 15 Wall., 538; 17 Wall., 382; 22 Wall., 350; 93 U. S., 297), and—

Hannibal R'y *vs.* Swift, 12 Wall., 270.
York Co. *vs.* Central R'y, 3 Wall., 112.
Shoemaker *vs.* Kingsbury, 12 Wall., 375.
Bank *vs.* Adams Express Co., 93 U. S., 185.
Railroad *vs.* Barrow, 5 Wall., 94.
Railroad *vs.* Jones, 95 U. S., 441.

As to the assertion that the damages awarded are excessive. The court here in general term has no jurisdiction to review the verdict of the jury and judgment thereon, unless the alleged excess arose

from error in the trial justice's instruction or charge to the jury.

The seventh article of the constitution restricts the jurisdiction of the court to such cases.

And we make the same point as to the jurisdiction of the court here to consider whether the verdict was against the weight of evidence.

But the serious and permanent injury received by Harmon fully justified the jury in awarding the damages they did.

Respectfully submitted.

LUTHER H. PIKE.